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# IDENTIFYING FUNDAMENTAL BREACH OF ARTICLES 25 AND 49 OF THE CISG: THE GOOD FAITH DUTY OF COLLABORATIVE EFFORTS TO CURE DEFECTS—MAKE THE PARTIES DRAW A LINE IN THE SAND OF SUBSTANTIALITY

*Yasutoshi Ishida\**

## I. INTRODUCTION

Article 49(1) of the United Nations Convention on Contracts for the International Sale of Goods (the “CISG”) allows the parties to international sales of goods to avoid their contracts.<sup>1</sup> In particular, it provides that “[t]he buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a *fundamental breach* of contract.”<sup>2</sup> The “fundamental breach” in this provision is defined by article 25, which provides,

A breach of contract committed by one of the parties is *fundamental* if it results in such detriment to the other party as *substantially* to deprive him of what he is entitled to expect under the contract, *unless* the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.<sup>3</sup>

This article addresses two daunting problems with this provision. The first problem lies in the “unless” clause of the latter part of the provision. The clause, which lays down a criterion referred to as the “foreseeability

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\* Professor of Law, Himeji-Dokkyo University, Japan. LLM, Kyoto University (1989). The author is profoundly indebted to late Professor Shinichiro Michida, Rapporteur of the CISG at the Diplomatic Conference in Vienna in 1980, Adjunct Professor at University of Michigan Law School, 1966. I also thank the editors of the *Michigan Journal of International Law* for their valuable help and comments. I especially owe much to Ms. Lindsay Bernsen Wardlaw, Editor-in-Chief. Her insightful suggestions greatly enhanced this article by making it logically consistent in every aspect and by refining my English.

1. UN Convention on Contracts for the Int’l Sale of Goods, art. 49(1), Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]. Applicability of the Convention is determined by article 1, which provides: “(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.”

2. *Id.* (emphasis added).

3. *Id.* art. 25 (emphasis added).

test” in this article, downgrades a fundamental breach to a non-fundamental one if the breaching party did not foresee, and if a reasonable person would not have foreseen, the *substantial detriment*.<sup>4</sup> As we will see in Part II, the role of the foreseeability test is very limited, partly because the phrase “what he is entitled to expect” in the former part of article 25 can perform a function comparable to the foreseeability test, and partly because it is questionable whether there is ever a real case in which a reasonable person could not foresee any results of a breach so devastating that they would substantially frustrate the buyer’s expectations.

In addition to its limited applicability, the foreseeability test has an intrinsic irrationality in linking unforeseeability to non-avoidance of contract. That is, under the foreseeability test, the aggrieved party cannot avoid the contract and must pay for the goods even if the goods are irreparably defective, so long as that result was unforeseeable to the breaching party. In sum, the foreseeability test is actually based on the notion of culpability—or the lack of it—on the part of the breaching party. This, however, is irrational: At the time of concluding the contract, reasonable merchants would tacitly assume that the contract should be avoided in such a situation. For these reasons, the foreseeability test both can and should be nullified: The nullification is no big deal for the CISG jurisprudence because the applicability of the test is very limited.

The second daunting problem in article 25 is how “*substantially deprived*” the buyer must be of “what he is entitled to expect under the contract” for the seller’s breach to become *fundamental*. As one commentary aptly points out, “[d]efining *fundamental* by *substantial* . . . leaves an impression of playful tautology.”<sup>5</sup> For example, it is probably clear that a seller delivering junk parts to a buyer, instead of the machine the buyer has contracted for, has substantially deprived the buyer of what he is entitled to expect under the contract, giving rise to a fundamental breach. However, matters are not always that simple. We do not have an appropriate criterion as to the level or magnitude required for substantial deprivation of the *legitimate expectations*<sup>6</sup> of the buyer. Whether a breach results in substantial detriment depends on each party’s expectations, along with numerous factors such as the kind and amount of the goods, purpose of the contract, and other circumstances peculiar to the transaction in question.<sup>7</sup> It

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4. In this article, the phrase “substantial detriment” is used as a short form for article 25’s language, “such detriment . . . as substantially to deprive him of what he is entitled to expect under the contract.”

5. Michael Will, *Article 25, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION* 205, 212 (Cesare Massimo Bianca et al. eds., 1987) [hereinafter *VIENNA COMMENTARY*] (emphasis added).

6. In this article, the article 25 language “what he is entitled to expect under the contract” is referred to as a party’s “legitimate expectations.”

7. See BRUNO ZELLER, *DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INT’L SALE OF GOODS*, ¶13.29 (3d ed. 2018) (“The word ‘detriment’ cannot be uniformly

also turns on many aleatory factors, such as the gravity of the defects, curability of defects, time and cost needed for cure,<sup>8</sup> and the willingness of parties to cure. It seems next to impossible to formulate a criterion which embraces all of these elements and combines them.

By applying article 7(1)'s good faith requirement to other provisions of the CISG relating to remedy, this article attempts to provide parties and judges with an alternative solution for determining the existence of a fundamental breach. Essentially, this article argues, a fundamental breach occurs when the parties' own attempts to cure have fallen short of the parties' obligations of good faith. This test both requires, and emphasizes the importance of, nullifying the foreseeability test: While parties can control and foresee their good faith efforts to cure, failed attempts to cure are often unforeseeable. It is unfair that the foreseeability test prevents the contract from being avoided in these situations, leaving fatally irreparable goods in the hands of the buyer, who is not relieved of his obligation to pay.

In summary, this article answers the question of how to determine the existence of a fundamental breach under article 25 that will enable avoidance under article 49. It does so in two broad stages: First, it explains that the second half of article 25 (the "foreseeability test") should receive lessened attention in this inquiry or should be rejected entirely. Second, it returns to the first half of article 25, which contains the article's affirmative elements, homing in on the element of substantial deprivation. The word "substantial" is subjective, and courts have struggled with its definition. This article therefore proposes to define the substantiality of a detriment through the existence of the parties' good faith efforts to remedy the detriment.

Part II critically examines the role of the "foreseeability test" and finds that it is not a necessary component of article 25's definition of a fundamental breach. In Section A, this article concludes that the "foreseeability test" exists as a proxy for the breaching party's culpability. It also points out the intrinsic irrationality of the foreseeability test, which links unforeseeability to non-avoidance. Section B demonstrates that a different article 25 phrase, "what he is entitled to expect," can independently perform a comparable function by screening out avoidances premised on the injured party's illegitimate expectations. Section C argues that, in any event, there are not many cases in which a reasonable merchant could not foresee that his action would constitute the kind of deprivation that would substantially frustrate the buyer's expectations.

Part III explores *when* the seller must foresee substantial detriment under the foreseeability test. In Section A, two opposing views are

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defined, as it depends on each party's expectations of his entitlement under the contract. . . . It takes on substance within a particular context only, that is, within a contract.").

8. In this article, the words "cure" and "remedy" mean to remove or ameliorate the defects or other non-conformities of goods by such measures as repair and substitution. They are also used as nouns of comparable meaning.

examined: one fixing the time of foreseeability at the time of conclusion of contract, and the other shifting the time of foreseeability to a later event. Section B concludes that reasonable merchants will have a shared tacit assumption at the time of concluding the contract that their contract should be avoided if a breach unforeseeably causes substantial detriment.

Part IV, by analyzing court decisions, shows that we lack any other appropriate criterion to identify a fundamental breach. It also shows that substantial detriment can be measured by availability of remedy.

Part V continues to evaluate substantial detriment through the lens of remedy, considering the case of easily obtainable, resalable, or repairable goods and the case of irreparably defective goods. In the former case, due to ease of remedy, a fundamental breach is relatively easily denied, and in the latter, due to the difficulty—or impossibility—of remedy it is relatively easily found.

In Part VI, focusing on cases which do not fall in either category discussed in Part V, the article argues that the good faith principle provided in CISG article 7(1) obliges the seller to offer to cure the goods' defects, and, conversely, it obliges the buyer to require the seller to do the same. Section A criticizes the view that a curable defect of the goods does not in itself amount to a fundamental breach, if there is the possibility that the seller may cure. Section B examines the buyer's right to require the seller to repair. Notably, article 46(3) provides that the buyer *may* require the seller to remedy the lack of conformity by repair but does not explicitly oblige the buyer to do so. Nevertheless, Section C advocates that the buyer *is obliged* to require the seller to repair defects by the application of article 7(1)'s good faith requirement. Section D argues that the good faith principle also obliges the buyer to require the seller to substitute the defective goods. Finally, Section E examines the seller's right to remedy his failure, provided in article 48(1), and shows that the good faith requirement obliges the seller to offer remedy. In the course of this reasoning, this paper settles the paradox of the article 48(1)'s cross-reference to article 49 ("Subject to Article 49"), one of the most controversial in international sales law.

Part VII synthesizes this analysis. It advocates that the seller and the buyer must, in collaboration, make bona fide efforts to cure any defects, and that the outcome of those attempts will decide whether the breach involved amounts to a fundamental breach, dispensing with the need for an abstract tautological criterion, like the foreseeability test.

## II. THE QUESTIONABLE ROLE OF THE FORESEEABILITY TEST

As introduced above, article 25 of the CISG defines a "fundamental breach"—one that allows a buyer to avoid a contract under article 49(1)—as a breach that

results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract,

*unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.*<sup>9</sup>

Critically, this provision releases the seller from the disadvantages resulting from the buyer's avoidance on two conditions: (1) The seller himself did not foresee the substantial detriment, and (2) a reasonable person of the same kind in the same circumstances would not have foreseen the substantial detriment. This author collectively refers to these criteria, found in the "unless" clause, as the "foreseeability test."

In this part, the article demonstrates that the role of the foreseeability test is very limited, partly because the "legitimate expectations" requirement is an independent qualifier on fundamental breach (separate from the foreseeability test, which functions as an escape hatch for sellers when substantial detriment and legitimate expectations are present), and it screens out those expectations of the aggrieved party which are unforeseeable for the breaching party. And partly because a reasonable person would usually foresee the substantial deprivation of a legitimate expectation.

These propositions nullify the foreseeability test, advocating its intrinsic irrationality. They also support the premise that this nullification will not have a significant implication for the CISG jurisprudence because cases that deny avoidance for the reason of unforeseeability are very rare. As later parts will discuss, the better reading of article 25 is that the outcome of bona fide efforts to attempt to cure should decide the fundamentality of the breach. Yet, if we attempt to add a good faith attempt to remedy to our article 25 analysis without nullifying the foreseeability test, we hit a paradox: Failures to cure are often unforeseeable, but being unforeseeable prevents the contract from being avoided! This result is irrational, leaving the fatally defective goods in the hands of the buyer, who must pay for them.

#### A. *The Notion of Culpability in the Foreseeability Test*

Why do we care about foreseeability? One possible interpretation of the foreseeability test is that it describes the extent to which society is willing to assign culpability (blameworthiness) to the breaching party. That is to say, the breaching party is not liable or culpable (and hence the breach is not egregious or "fundamental") where the breaching party "did not foresee" substantial detriment to the other party. Put in the terminology of criminal law, the breaching party did not have *mens rea* in bringing about such serious results from his breach. If asked, he would say, "Little did I dream of my breach causing such a ruinous situation." In such a situation, article

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9. CISG, *supra* note 1, art. 25 (emphasis added).

25 exonerates the breaching party from culpability, and, accordingly, from the hardship he would suffer if the injured party avoided the contract.

In contrast, the breaching party is culpable—and hence the breach is fundamental—if the breaching party foresaw the injured party’s substantial detriment because in that case the breaching party did have *mens rea*. The breaching party, if explaining the situation candidly, would say, “I knew well my breach would produce such a ruinous situation, and I dared do it.”

The drafting history of article 25 buttresses its interpretation as an article determined by culpability. In 1976, the seventh session of the Working Group of the United Nations Commission on International Trade Law (“UNCITRAL”) made the following draft of the article: “A breach committed by one of the parties to the contract is fundamental if it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result.”<sup>10</sup> Read carefully, this language put the burden of proof on the claimant (the aggrieved party) to show that the breaching party foresaw or had reason to foresee the resulting detriment, rather than on the breaching party to show that it did not foresee the same. In UNCITRAL’s 1977 Session, a delegate of the Philippines, criticizing the draft, stated:

Under the provisions of the article as it stood, it would be necessary for the party in breach to foresee the result before a breach committed became a “fundamental breach.” That was something that would be extremely difficult to prove in court and it seemed most unfair that the *guilty* party should be able to throw the burden of proof on to the aggrieved party.<sup>11</sup>

Following this criticism, article 25 was given its “unless” clause to move the burden of proving (un)foreseeability to the “guilty” party—namely, the party who has committed a fundamental breach.<sup>12</sup> It was thereby settled that the breaching party is not responsible for the unforeseeable consequences of his breach.<sup>13</sup>

The underlying problem with this approach is the irrational fiat of the “unless” clause which links unforeseeability with unavailability, based on

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10. See Shinichiro Michida, *Cancellation of Contracts*, 27 AM. J. COMP. L. 279, 282 (1979); see also U.N. Comm’n on Int’l Trade Law [“UNCITRAL”], Yearbook Volume VII: 1976, U.N. Doc. A/CN.9/SER.A/1976, at 90, art. 8 (1977).

11. See Michida, *supra* note 10, at 285 (emphasis added); see also UNCITRAL, Yearbook Volume VIII: 1977, U.N. Doc. A/CN.9/SER.A/1977, art. 9 (1978).

12. See Ulrich G. Schroeter, *Article 25*, in PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 416, 419, ¶ 5 (Ingeborg Schwenzer ed., 4th ed. 2016) [hereinafter SCHLECHTRIEM & SCHWENZER] (“It was only logical that, following a proposal by the Philippines, an attempt was made to clarify the exceptional nature of that exoneration by including the wording ‘unless . . .’: Material loss which the promisor did not foresee and could not have foreseen should not be his responsibility.”).

13. *Id.*

the notion of culpability.<sup>14</sup> Even when comparing otherwise identical substantial detriments arising from a serious breach, the breaching party is not culpable, and hence the breach is not fundamental, if the breaching party did not foresee, or a reasonable person would not have foreseen, such a result. If he foresaw or a reasonable person would have foreseen such a result, the same breach is upgraded to a fundamental one. But that does not make sense: Something that “results in such detriment to the other party as substantially to deprive him of”<sup>15</sup> his legitimate expectations will be something that results in that detriment, regardless of whether it is foreseeable or not. A grave detriment is a grave detriment after all, regardless of its foreseeability. This illogicality produces a similarly illogical outcome: Even though the non-breaching party is substantially deprived of his legitimate expectations, he cannot avoid the demolished contract when the detriment is not foreseeable. Must a buyer pay for junk?

*B. Restrictions on the Type or Content of Expectations by Legitimacy*

This section deals with the *type or content* of the injured party’s expectations regarding its counterparty’s performance of contract, setting aside for a while the issue of the *substantiality* of the deprivation which will be discussed in the next section. As we have seen in the last section, the foreseeability test is based on the notion of the culpability of the breaching party. Consequently, concerning the type or content of the injured party’s expectations, the nub of the notion is that it is unjust for a breaching party to be forced to endure the hardship of the injured party’s avoidance when he did not foresee, and a reasonable person of the same kind in the same circumstances would not have foreseen, that the injured party would have a certain type of expectation from the contract and that this expectation would be frustrated by the breach.

“[A] reasonable person of the same kind in the same circumstances” is construed to be “a reasonable merchant” in the same circumstances. “Ordinarily this will mean merchants with a reasonable degree of

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14. There is another argument against avoidance in unforeseeable situations: It would be anomalous for article 49 to grant the remedy of avoidance for the unforeseeable consequences of a breach, while damages are not granted for them by article 74, which provides that “damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract.” In other words, it would be incongruous “if a party could take the radical step of avoiding the contract on the basis of consequences for which it could not even recover damages.” Robert Koch, *The Concept of Fundamental Breach of Contract Under the U.N. Convention on Contracts for the Int’l Sale of Goods (CISG)*, in 1998 REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 177, 322 (Pace International Law Review ed. 1999). The unavailability of damage claims for unforeseeable loss has more affinity with avoidance than maintenance of contract, because the unavailability of damage claims and avoidance commonly treat unforeseeable situations as belonging to the extraterritorial sphere of contract where the parties are released from their contractual obligations.

15. CISG, *supra* note 1, art. 25.



knowledge and experience in their trade, including knowledge of the relevant market conditions, whether regional or global.”<sup>16</sup> Where even such a knowledgeable merchant would not have foreseen the result of a breach, the breaching party has a good reason to resist avoidance by the other party. For him, avoidance is “a bolt from the blue” and he might say, “Little did I dream that you would have such expectations.”

Article 25 provides a safeguard against this bolt from the blue through what this author calls the “legitimate expectation test.” This test restricts avoidance to situations where the injured party’s expectations do not exceed “what [that party] is entitled to expect under the contract.” Notably, article 25 does not say “what [the injured party] expects under the contract.”<sup>17</sup> What a party is *entitled* to expect under the contract is different from what it does expect under the contract.

For example, Seller S concluded a contract with Buyer B over the phone to sell B 15 units of computer parts. B unjustifiably had a misconception that the amount was 50 units. (The confirmation fax sent by S after the phone call clearly indicated “15 units,” but B overlooked it.) S delivered 15 units to B. B found that all 15 units were seriously defective. B refused to pay, avoiding the contract. B’s avoidance is justified on the basis that all of the delivered units were seriously defective but *not* because he was “entitled to expect” 50 units (as he subjectively expected) instead of 15 units.<sup>18</sup> (Had all 15 units been without defect, B’s avoidance would not be justified.)

The injured party’s legitimate expectations should be determined primarily by what the parties have explicitly or impliedly agreed in the contract.<sup>19</sup> Determination of the content of the contract, and hence

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16. Andrea Björklund, *Article 25, in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 337, 344, ¶ 22 (Stefan Kröll et al. eds., 2 ed. 2018) [hereinafter UN COMMENTARY]; see also Andrew Babiak, *Defining Fundamental Breach Under the United Nations Convention on Contracts for the International Sale of Goods*, 6 TEMP. INT’L & COMP. L.J. 113 at 122 (1992) (“Since parties to contracts involving international sales are presumed to be merchants, a ‘reasonable person’ may be construed as a reasonable merchant. A reasonable merchant would, therefore, encompass all merchants that satisfy the standards of their trade and that are not intellectually or professionally substandard. The phrase ‘of the same kind’ refers to a merchant in the same business, doing the same functions or operations as the party in breach. The requirement that the reasonable merchant be ‘in the same circumstances’ refers to the market conditions, both regional and world-wide.”).

17. See CISG, *supra* note 1, art. 25.

18. An *ad hoc* working group on First Committee Deliberations at the 1980 Vienna Diplomatic Conference proposed that a breach is “fundamental” “if it results in such detriment to the other party as will substantially impair his expectations under the contract.” In a twenty-two to eighteen vote, the majority of delegations agreed to this definition, with three of them explicitly noting that the reference to a party’s expectations under the contract added an additional element of objectivity to the definition. See JOHN O. HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 550–51 (1989).

19. See Koch, *supra* note 14, at 262–63.

demarcation of a party's legitimate expectations, is primarily a matter of contract interpretation. Therefore, it is subject to the general interpretive rules of the CISG provided in article 8:<sup>20</sup>

- (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
- (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.<sup>21</sup>

Paragraph (1) provides that a party's subjective intent prevails "where the other party knew or could not have been unaware" of it. For example, a buyer has long ordered from a seller 1,000 units of certain goods every month. One month, the buyer's fax order form showed 10,000 units instead of 1,000 units. Having received no notice of change, the seller assumed it was a simple error and that the buyer's intent was to buy 1,000 units as usual. Under paragraph (1), this was appropriate: The seller knew of the buyer's intent, or at least could have been unaware of any changes in the buyer's intent.

Paragraph (2) provides that, when paragraph (1) does not apply, "the understanding that a reasonable person of the same kind" prevails. In the above example, if the buyer and seller had no long-term relationship, then the seller would be in no position to infer the real intent of the buyer. and a reasonable person of the same kind as S would understand that the amount of the ordered units was 10,000, as shown in the order form.

To clarify how article 8 works to determine whether a party "is entitled to expect under the contract" a certain interest, consider the following example:

Seller S, engaged in producing and selling machine parts, concluded a sales contract with Buyer B, an interior construction company, for 500 golden gears of certain types and sizes. After delivery, B found all the 500 gears had slight stains on their surface which lessened their gloss. The stains were unremovable but had no adverse effects if they were used as parts of machines. However, B intended to use them as parts of an artistic decoration

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20. See PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 178, art. 25 (Peter Schlechtriem ed. 1998) ("When interpreting the contract, knowledge or foreseeability of the promisee's expectations would have to be taken into account also under Article 8(1) and (2)."); see also ZELLER, *supra* note 7, ¶13.27 ("Article 25 also includes a proviso, namely foresee-ability and knowledge that a breach would result in substantially depriving the other party 'of what he is entitled to expect'. The expectations of the promise would have to be taken into account under Article 8(1) and (2).").

21. CISG, *supra* note 1, art. 8(1)–(2).

exhibited in the entrance hall of a department store which had hired B for the construction. B, simply filling out the order form on S's website, did not inform S of this special usage and that the luster of the gears was very important for B. B considered the stains on the gears to be a fundamental breach and declared the contract avoided. S did not know the importance of the shininess of the gears.

In this example, one of the possible issues is whether B "is entitled to expect under the contract" that the gears are free of stains and shiny enough to be used for decoration. Applying article 8, B is not entitled to expect it. According to paragraph (1), B's intent to have gears shiny enough for decoration is acknowledged in the interpretation of the contract only "where the other party knew or could not have been unaware" of it. However, S did not know B's intent in the hypothetical situation posed above. Also, S could have been unaware of B's intent because S simply received B's order by website among many other orders for parts of machines.

Separately, according to paragraph (2), B's intent may be acknowledged when it accords with "the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances." However, a reasonable person of the same kind as S would not have the understanding that B would use the gears for decoration, given that S only received B's order through the website without any notice of its special purpose.

The above reasoning establishes that the phrase "is entitled to expect" imposes an objective restriction on the type or content of the buyer's expectations, the substantial deprivation of which may be considered a fundamental breach. The phrase "is entitled to" manifestly limits expectations to those objectively ascertainable or foreseeable ones. Even if a non-breaching party was substantially deprived of some benefit that he tried to obtain, so long as he was not "entitled to expect" it, it is a matter outside of the ambit of article 25.

When a buyer's expectations are illegitimate, we need not go on to inquire whether the deprivation of those expectations was foreseeable or not; it cannot form a basis of a fundamental breach. Thus, the foreseeability test—used to absolve sellers of liability where they lack the requisite *mens rea* to substantially deprive the buyer of the buyer's legitimate expectations—is not necessary to excuse sellers when they could not have expected that their own behavior would constitute a breach. Instead, the requirement of "is entitled to expect" can independently and affirmatively screen out buyers' illegitimate expectations.<sup>22</sup> What is left on the sieve cannot be a "bolt from the blue" for sellers. The breaching party can seldom

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22. See Schroeter, *supra* note 12, at 420, ¶5 ("During the Vienna Diplomatic Conference, it was subsequently not fully realized that by reducing the importance accorded to 'substantial detriment' in favour of determining detriment by reference to what the promise . . . expected from the contract, 'foreseeability' had thereby lost its function as a ground for excuse where loss was unforeseeable.").

have an opportunity to say, “I never foresaw that my breach would deprive my counterparty of its illegitimate expectation,” because the counterparty is not entitled to hold such an expectation in the first place, and therefore cannot claim on it. The following observation is pertinent to this conclusion:

unforeseeability can be successfully invoked only when the aggrieved party’s special interest in the performance of the violated duty does not follow from the terms of the contract or from the negotiations between the parties prior to the[ir] conclusion. In most of the reported cases in which the courts found [a] fundamental breach, however, the aggrieved party’s special interest was obvious from the terms of the contract, or the aggrieved party was able to prove that it had made clear its special interest during the contract negotiations.<sup>23</sup>

Essentially, in the very circumstances where the drafters of the foreseeability test appeared worried that article 25 might be used to graft liability onto unsuspecting sellers (when a buyer wanted something from its purchase that the seller could not have predicted), article 25’s “legitimate expectations” test is independently sufficient to protect sellers.

### C. Requirement of Substantiality

The last section showed that the foreseeability test is unnecessary to limit the type or content of the *interest* an injured party may expect from a contract because the “entitled to expect” test performs a comparable function. It also pointed out that in most cases parties are entitled to the benefit of the bargain (or “special interest”) they expected. Cases are rare in which both (1) parties are not entitled to their interest and (2) the deprivation of that interest is unforeseeable. Therefore, the foreseeability test, when applied to the *type of expectation*, plays a limited analytic role.

Yet, the foreseeability test may still have another culpability-gauging function, *i.e.*, limiting the *type of the deprivation* itself by imposing a criterion of *substantiality* on claims of fundamental breach. Beyond limiting expectations to those of a foreseeable type or content, the foreseeability test can be construed to impose the requirement that the magnitude, or the substantiality, of a deprivation be foreseeable (*e.g.*, by setting the *amount* or *proportion* of defective goods required). From this perspective, the test commands inquiry into whether a breaching party did not foresee, or a reasonable person would not have foreseen, that the injured party’s (1) deprivation of (2) legitimate expectations would be (3) substantial. Where a buyer’s expectations are given to be legitimate, a breaching party may say, “Little did I know *how much* my breach subverted your expectations.” Where such a breach is “substantial,” the foreseeability test prevents the aggrieved party from avoiding the contract.

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23. Koch, *supra* note 14, at 258.

Let us consider the following example:

The seller, a trading company of agricultural products, agreed to ship 5,000 bushels of grade no. 1 corn to the buyer, a producer of cornflakes. But the seller actually delivered 5,000 bushels of grade no. 2 corn. The corn of that grade is of no use for production by the buyer. The seller offered to redeliver grade no.1 corn to the buyer within a month. The buyer refused this offer because it would materially delay its production schedule and avoided the contract.

In this example, it goes without saying that the buyer was deprived of its legitimate expectations, *i.e.*, a timely delivery of 5,000 bushels of grade no. 1 corn and the profit arising from the production of cornflakes by using it. Further, because the whole order of corn delivered was unusable, there is no doubt that the deprivation was *substantial*. Likewise, the seller is a trading company of agricultural products, and therefore it is inconceivable that he “did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen” such a result.<sup>24</sup> It would be hard to imagine that an expert merchant is ignorant of the fact that certain product defects may substantially deprive the other party of what he can legitimately expect. Rather, the more substantial the deprivation is, the less likely it is that “merchants with a reasonable degree of knowledge and experience in their trade”<sup>25</sup> would fail to foresee it.

In my analysis, the instances in which the foreseeability test will be used to determine the substantiality of a deprivation are limited, and the instances in which it will weed out claims not already screened by the legitimate expectations test are fewer still. Consider: The inquiry of substantiality is necessary only for those kinds of expectations which have been sifted through the legitimate expectations test. On the sifter are left only those expectations which are reasonably cognizable. Accordingly, at this stage, there seem to be few cases where a reasonable merchant fails to foresee that the deprivation of legitimate expectations would be substantial.<sup>26</sup> Again, then, the foreseeability test has little to add over affirmative requirements of article 25 in the legitimate expectations and substantial deprivation tests.

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24. CISG, *supra* note 1 art. 25.

25. Björklund, *supra* note 16, at 344.

26. Nonetheless, one such example is given in Part III.A: Essentially, when seller acts on background norms and customs of an industry that suggest certain literal terms of the contract may be breached without consequence or at a slight price accommodation, if this does not match the buyer's particular expectations that the term be met exactly as written.

### III. THE TIME OF FORESEEABILITY AND PARTIES' SHARED TACIT ASSUMPTIONS

#### A. *Time of Foreseeability*

There is one major, persistent problem with the foreseeability test (even when deployed in the limited form discussed above to evaluate substantiality): The time when foresight is required, *i.e.*, when the breaching party must foresee the result of his breach, is ambiguous. There are two opposing views—one fixing the “time of foreseeability” at the time of conclusion of contract, and the other taking account of later events. Insisting that the time of foreseeability should be fixed at the time of the conclusion of contract, Professor Schlechtriem expounds on his theory of foreseeability as a substitute for certain contractual terms as follows:

In the author's opinion, the role which foreseeability plays . . . makes it clear that it is the time when the contract was concluded that is decisive. The promisor's knowledge or the foreseeability of the promisee's interest in individual contractual obligations and methods of performance can be a 'substitute' for the need to reach clear agreement in the contract on the importance of those matters, *i.e.* it can make an appropriate interpretation of the contract possible. However, the importance attached by a promisee to a particular obligation, which has been shown otherwise than by express agreement, must nevertheless be fixed by the time the contract is concluded. If knowledge or foreseeability is to be equivalent to express agreement, it must in any event exist at the time when the contract was concluded.<sup>27</sup>

In his theory, foreseeability must be a part of the contract or a substitute for contractual terms. Therefore, whether the seller foresaw, or a reasonable person would have foreseen, substantial detriment must be determined by either the presence of an express contractual agreement or by inferring the seller's mental state at the time of the conclusion of the contract.

On the other hand, Professor Honnold argues that information acquired after the conclusion of the contract is relevant to or even decisive of foreseeability. He illustrates this through a hypothetical shipment of rice bags:

S agreed to ship 100 bags of rice to B. B's order was on a printed form that specified “new bags.” When S prepared to ship, he had at hand sound, used bags that he believed were of the same quality as

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27. SCHLECHTRIEM, *supra* note 20, at 180. See also Ulrich Magnus, *Beyond the Digest: Part III (Articles 25–34, 45–52)*, in THE DRAFT UNCITRAL DIGEST & BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 319, 324 (Ronald Brand et al. eds., 2004).

new bags and would be acceptable to B subject to a modest price allowance. However, before S bagged the rice, B telexed S, "Have obtained contract for resale of rice which emphasizes use of new bags. Although sound used bags would usually be acceptable subject to a price allowance, use of new bags for this shipment is very important." S replied, "Shipping in extra high-quality used bags." B rejected the shipment and notified S that the contract was avoided because of the danger of rejection by the sub-purchaser.<sup>28</sup>

The gist of this example is that while S could not foresee a substantial deprivation of B's expectations at the time the parties concluded the contract, substantial deprivation became foreseeable after B informed S of the resale contract which emphasized new bags. In this example, Professor Honnold demonstrates that the time of foreseeability provided in article 25 can shift from the time of the conclusion of the contract to the time of the telex. According to his view, S could foresee, at the time of the shipment, the substantial deprivation of B's legitimate expectations. Hence, S's choice to ship the rice in used bags qualifies as a fundamental breach.

Respectfully, this example is flawed. The example makes clear that at the time of the conclusion of the contract, the parties had a custom to treat "sound used bags" as "new bags" with a price allowance.<sup>29</sup> The telex sent by B clearly indicates that they had customarily accepted sound used bags as new bags. This interpretation of the word "new" is not objective, but according to CISG article 8(1), the subjective usage shared by both parties prevails over otherwise objective usages.<sup>30</sup> Therefore, there was no breach of the contract, even if S sent the rice in used bags. Because it was a part of their contract that, subject to a price allowance, sound used bags were acceptable for B, S's choice to ship in sound used bags never "substantially. . .deprive[d] [B] of what he [was] entitled to expect under the contract."<sup>31</sup>

Instead, Professor Honnold's example illustrates an offer to modify the contract: B's telex was an offer to modify the parties' mutual agreement as to the quality of bags. S rejected this offer, by replying, "Shipping in extra high-quality used bags." B's offer to modify the contract failed, and both parties remained bound to their original contract. B could neither reject S's delivery, nor avoid the contract.<sup>32</sup>

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28. JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 276 (Harry M. Flechtner ed., 4th ed. 2009).

29. CISG, *supra* note 1, art. 9(1) ("The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.").

30. CISG, *supra* note 1, art. 8(1) ("[S]tatements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.").

31. CISG, *supra* note 1, art. 25.

32. One commentator presents a similar hypothetical, suggesting that information exchanged by the parties after the conclusion of the contract is relevant to their legitimate

Yet, Professor Honnold has a point. Let us consider another version of Professor Honnold's hypothetical by deleting B's telexed concession ("[a]lthough sound used bags would usually be acceptable subject to a price allowance") to S. In this version, there is no such custom between the parties as described in Honnold's original hypothetical. This deletion changes the story. At the time of the conclusion of the contract, B meant literally new bags, while S plotted to send the rice in sound used bags, subjectively thinking that this would be acceptable for B. Notice that in this amended example, S intended to breach the contract, but thought that his breach would be a minor one remedied by a price allowance. In other words, he did not foresee that his breach would result in *substantial detriment* to B. This situation was changed by B's telex to S ("Have obtained contract for resale of rice which emphasizes use of new bags. Use of new bags for this shipment is very important.") At this point, it became foreseeable to S that his breach would substantially deprive B of his legitimate expectations. Nevertheless, S replied, "Shipping in extra high-quality used bags." B rejected the shipment and notified S that he was avoiding the contract because of the danger of rejection by the sub-purchaser. Professor Honnold's conclusion becomes pertinent in this modified hypothetical:

[T]he information the seller received subsequent to the contract but before shipment gave the seller reason to foresee that the breach of contract would 'substantially' deprive the buyer of what he was entitled to expect under the contract, and that the buyer's avoidance was justified under articles 25 and 49(1)(a).<sup>33</sup>

Here, according to Professor Honnold's view, the time of foreseeability does shift from the time of conclusion of the contract to the time of B's telex. Knowledge or information obtained after the conclusion of contract may therefore be relevant to determine foreseeability.

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expectations. See Koch, *supra* note 14, at 321 (The buyer "could transform a contract, in which the time of delivery is not fundamental, into a transaction where time is of the essence of the contract by simply informing the seller that he has promised to sell the goods at a particular time."). This illustration also involves a unilateral offer to modify an explicit or implied contract term as to the date of delivery, and the seller is not bound to it unless he accepts the offer. See also Franco Ferrari, *Fundamental Breach of Contract Under the UN Sales Convention—25 Years of Article 25 CISG*, 25 J.L. & COM. 489, 500 (2006) ("Allowing for communications made after the conclusion of the contract to become relevant would permit a unilateral modification of the balance of the parties' interests as laid out in the contract, which is hardly appropriate.").

33. HONNOLD, *supra* note 28, at 277.



B. *Shared Tacit Assumptions and the Intrinsic Unreasonableness of the Foreseeability Test*

Professor Eisenberg's "shared tacit assumption" theory sheds light onto the discussion concerning the foreseeability test.<sup>34</sup> While negotiating and concluding a contract, parties share many tacit assumptions. These assumptions may vary from "the sun will rise again tomorrow" to "the crude oil price will be steady during the one-month life of the contract." They are a part of the contract in that the parties would not have made the contract, or would have agreed otherwise, if they had been fully aware that the assumed situations would not come about ("the sun will not rise tomorrow" or "the crude oil price will sky-rocket in a month"). They are basic conditions of the contract but are simply too basic to merit attention or mention. Professor Eisenberg explains:

Shared tacit assumptions . . . are just as much a part of a contract as explicit terms, so that where the risk of an unexpected circumstance would have been shifted away from the promisor if the assumption had been made explicit, an otherwise identical shared tacit assumption should operate in the same way.

This approach to shared tacit assumptions is an application of the usual hypothetical-contract methodology, under which unspecified terms are usually determined on the basis of what the contracting parties probably would have agreed to if they had addressed the relevant issue.<sup>35</sup>

According to Professor Schlechtriem's interpretation of the foreseeability test, which fixes the time of foreseeability at the time of conclusion of the contract, if the parties are presumed not to have foreseen the substantial detriment at the time of conclusion of contract, the contract cannot be avoided. On the other hand, if we apply the shared tacit assumption theory, the result would likely be the opposite. This theory assumes that, if they had addressed the issue of an unforeseeable situation resulting from a breach, it is very likely that, in most circumstances, the parties would have agreed, "if a breach of our contract causes a detriment more substantial than reasonable merchants like us could have foreseen, the contract should be avoided." This assumption seems supported in fact; it represents what reasonable merchants will agree to if they do address the issue of the unforeseeable consequence of a breach.<sup>36</sup> It is also justified

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34. Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207, 211-14 (2009).

35. *Id.* at 214.

36. *See id.* at 219 (The "shared-assumption test" "allocates away from the adversely affected party the risk that a certain kind of unexpected circumstance will occur if the parties share a tacit assumption that the circumstance will not occur.").

because it prevents an irrational consequence inherent in the foreseeability test: leaving the fatally defective goods in the hands of the buyer without relieving him of his obligation to pay.

Functionally, under the shared tacit assumption framework, one of the biggest problems with the foreseeability test—the point at which a seller must foresee the consequences of breach—is resolved, but the test itself becomes still more useless: We do not need to know what the seller foresaw if we can simply assume that the parties would wish to avoid contracts when substantial detriment is unforeseeable.

#### IV. SEARCHING FOR A CRITERION OF SUBSTANTIALITY

In Parts II and III, we saw that the role that the foreseeability test plays is very limited, suggesting that the test brings irrational results even in the narrow area where it can be applied: According to the foreseeability test, when the consequence of a breach is unforeseeable cannot be avoided, and this is often at odds with justice. Thus, the foreseeability test is useless at best and paradoxical at worst. It is “an unfortunate historical mistake”<sup>37</sup> and should be nullified in the jurisprudence.<sup>38</sup> Instead, I argue that courts and parties alike should rely on parties’ good faith attempts to cure to determine the fundamentality of the breach.

The foreseeability test is as good as dead. Please do not let it rule from its grave.<sup>39</sup> With foreseeability discarded, all that prevents article 25 from being consistently applied are the questions we started with: What makes a breach fundamental? When is a detriment substantial?

##### A. *Lack of Administrable Criteria*

Reading through cases hinging on fundamental breach under article 25 gives the impression that they were decided by hunch rather than by a verbatim application of the letters of article 25. Surprisingly, some cases do not quote from article 25 at all. Others do not even mention the words “Article 25.”

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37. Schroeter, *supra* note 12, at 420, ¶5 (“[I]n fact [the foreseeability test] had become superfluous—an unfortunate historical mistake, which has caused and still is causing some confusion in the interpretation of Article 25.”).

38. Tellingly, the nullification of the test is no big deal for the CISG jurisprudence because the test rarely plays an active role. For example, Professor Epstein criticizes the foreseeability test for ignoring commonplace assumptions of professional businessmen. See Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 124 (1989) (“Foresight here [in *Hadley v. Baxendale*, 156 ENG. REP. 145 (Ex. Ch. 1854)], like reasonableness in so many quarters of the law, utterly lacks the descriptive content that allows it to be the principled basis for decision.”).

39. See F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 2 (A.H. Chaytor & W.J. Whittaker eds. 1936) (“The forms of action we have buried, but they still rule us from their graves.”).

An example is the *Germany Iron-Molybdenum Case*.<sup>40</sup> The buyer contracted with the seller to deliver iron-molybdenum from China under the international commercial shipping term (“Incoterm”) “CIF Rotterdam.” Later, on several occasions, the seller demanded price increases for the commodity, due to a rise in market price, each time missing and then renewing the delivery date. The buyer avoided the contract and made a substitute purchase, just as he had warned the seller he would.

The Appellate Court of Hamburg stated that the buyer’s special interest (expectation) in the timely delivery could be inferred from the parties’ use of Incoterm CIF “under which timely delivery is a fundamental obligation” of the seller.<sup>41</sup> The seller breached the obligation and “left the Buyer in complete uncertainty as to whether and when it would comply with its obligation to deliver.”<sup>42</sup> Noting this, the court found a fundamental breach. Although the court referred to articles 25 and 49, it did not quote from these provisions, and it did not evaluate whether there was a substantial deprivation of the buyer’s legitimate expectations.

Another example is the *France Laminated Sheet Metal Case*.<sup>43</sup> The laminated sheet metal that the seller delivered to the buyer failed to comply with the contract both in quantity and quality, and the delivery was late by more than one month. The Supreme Court of France (the Cour de Cassation) listed the defects in the seller’s goods and quoted the expert’s findings: “After all the tests and visual examination, I can affirm that the sheets are absolutely unacceptable for the use for which they were destined.”<sup>44</sup> The Court held that “the goods delivered were not conforming, in their definitive characteristics[,] with respect to those which had been ordered,”<sup>45</sup> and concluded that the buyer’s avoidance was well-founded. The Court, however, did not quote from articles 25 or 49. It did not even mention the titles of these articles.

On the other hand, the *U.S. Compressors for Air-Conditioners Case* is an example in which a court duly specified the factors amounting to substantial deprivation of legitimate expectations while quoting from article 25.<sup>46</sup> The seller, a manufacturer of compressors for air conditioners, agreed to sell 10,800 compressors to the buyer, a manufacturer of air conditioners.

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40. Oberlandesgericht [OLG] [Provincial Court of Appeal] Feb. 28, 1997, 1 U 167/95, translation available at <http://cisgw3.law.pace.edu/cases/970228g1.html> (last updated Sept. 12, 2007) (Ger.) (Iron-Molybdenum Case).

41. *Id.*

42. *Id.*

43. Cour de Cassation [Cass.] [Supreme Court] May 26, 1999, P 97-14.315, Arrêt no. 994 D, translation available at <http://cisgw3.law.pace.edu/cases/990526f1.html> (last updated June 19, 2007) (Fr.) (Laminated Sheet Metal Case).

44. *Id.*

45. *Id.*

46. *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995) (Compressor Case).

The contract provided for the delivery in three shipments. The seller made the first shipment. While the second shipment was en route, the buyer discovered that 93% of the compressors in the first shipment were non-conforming: They had less cooling capacity and consumed more electricity than required by contract specifications. The buyer rejected the second shipment and stored it at the port of delivery. After trying unsuccessfully to cure the defects of the first shipment, the buyer demanded that the seller reship conforming compressors, but the seller refused. The buyer declared the contract avoided. The U.S. Court of Appeal held:

In granting summary judgment, the district court held that “[t]here appears to be no question that [the buyer] did not substantially receive that which [it] was entitled to expect” and that “any reasonable person could foresee that shipping non-conforming goods to a buyer would result in the buyer not receiving that which he expected and was entitled to receive.” Because the cooling power and energy consumption of an air conditioner compressor are important determinants of the product’s value, the district court’s conclusion that [the seller] was liable for a fundamental breach of contract under the Convention was proper.<sup>47</sup>

Thus, the court, properly quoting from article 25, duly enumerated aggravating factors of a breach and concluded that this situation qualified as substantial detriment.

However, even reasoning like this, which cites to article 25 directly, appears to be lacking something. We still do not have a criterion to determine “how bad is bad.” We still need to know how many of the enumerated, injurious factors are required or how serious they must be to satisfy the requirement of substantial detriment. In other words, there needs to be an interpretative criterion that tells us when to apply the text of article 25 to the facts of the case at hand.

To see why this is so, consider by analogy CISG article 39(1), which provides: “The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.”<sup>48</sup> What “a reasonable time” means in this provision has long been a subject of controversy.<sup>49</sup> There is one potential criterion which sets the limit at one month.<sup>50</sup> That is, if the buyer gives the seller notice of non-conformity within a month, his notice is regarded as given within a reasonable time, so he does not lose the right to rely on the

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47. *Id.* at 1028–29.

48. CISG, *supra* note 1, art. 39(1).

49. See Ingeborg Schwenzer, *National Preconceptions That Endanger Uniformity*, 19 PACE INT’L L. REV. 103, 104, 109–11 (2007).

50. *Id.* at 111–24.

non-conformity and can claim damages based on it.<sup>51</sup> If a court adopts this criterion in applying article 39(1), its analysis will have two stages: It must first articulate the prevalent rule that a reasonable time of notice is one month, and then it must ascertain whether the delay involved in the case at hand is within that reasonable length of time (*i.e.*, a month). If it is, the court will consider notice properly given and allow the buyer to claim for remedies for the non-conforming goods.

To determine the requisite level of substantial deprivation of a buyer's legitimate expectations, there appears to be no operable interpretative criterion which judges can invoke. Without an interpretive guide, judges will be limited to listing those detrimental factors which in their perception should be sufficient to overcome the hurdle of substantiality.<sup>52</sup> Criteria suggested by courts include "when the purpose of the contract is endangered so seriously that, for the concerned party to the contract, interest in the fulfilment of the contract *ceases to exist as a consequence of the breach*,"<sup>53</sup> or when a breach "concern[s] the essential content of the contract, the goods, or the payment of the price concerned . . . lead[ing] to serious consequences to the economic goal pursued by the parties."<sup>54</sup>

Although these criteria might fit the facts of the cases where they were announced, they are not only as abstract as the language of article 25 itself, but they also seem to deviate from it. For example, unlike in the latter criterion above, article 25 does not stipulate that a breach must concern the "essential content" of the contract, and a breach of a minor term of the contract, such as the manner of packaging, could still lead to a substantial detriment.<sup>55</sup>

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51. *Id.* I have suggested a criterion that is similar, but that varies in a critical way: a *rebuttable presumption* that one month is "a reasonable time." That is, if the buyer gives the seller notice of non-conformity within a month, he is presumed to have complied with the requirement of article 39(1). At the same time, the criterion allows for the seller's rebuttal that he has suffered substantial prejudice from the delay. That is, even when the buyer gives notice of non-conformity within a month, he loses the right to rely on the non-conformity if delay caused substantial prejudice to the seller. See Yasutoshi Ishida, *CISG Art. 38 & 39 and Japanese Commercial Code Article 526—Examination of Goods and Notice of Non-conformity: "One Month No Prejudice" Test*, 56 HIMEJI L. REV. 1, 14–15 (2015).

52. See, e.g., 71 F.3d. at 1028–29, *supra* note 46.

53. Oberlandesgericht Frankfurt [OLGZ] [Frankfurt Court of Appeal] Sept. 17, 1991, 5 U 164/90, *translation available at* <http://cisgw3.law.pace.edu/cases/910917g1.html> (last updated Mar. 20, 2007) (Ger.) (Shoes Case).

54. Bundesgericht [BGer] [Federal Supreme Court] Sept. 15, 2000, 4C.105/2000, *translation available at* <http://cisgw3.law.pace.edu/cases/000915s2.html> (last updated Feb. 16, 2007) (Switz.) (Egyptian Cotton Case).

55. See BENJAMIN K. LEISINGER, *FUNDAMENTAL BREACH CONSIDERING NON-CONFORMITY OF THE GOODS* 132 (2007) ("Where the buyer purchases the goods for resale and the non-conforming packaging leads to the consequence that the goods cannot be immediately resold—as in string transactions—within the buyer's normal course of business, the buyer is entitled to avoid the contract. Here, because of the circumstances prevalent in the

However, judges are not to blame. As is rightly pointed out, “the concept of fundamental breach depends upon the concept of substantial deprivation, but a definition of the latter is not found in the provision, leaving the interpreter without a benchmark as to the extent of deprivation required to constitute a fundamental breach.”<sup>56</sup> It may be impossible to contrive a universal criterion which could bridge the language of article 25 and the unique facts of each case. The existence of a fundamental breach depends on too many aleatory parameters that can vary depending on the kind of transaction and of goods, and on the nature and extent of the breach involved. These complexities seem to prevent any attempt to make a universal criterion. Therefore, this article takes a different approach.

### B. *Substantiality of Deprivation in Terms of Availability of Remedy*

The thesis of this article is that the curability of defects can play a role in the substantial detriment test, and that the determination of curability should be made by the parties, who are the most acquainted with their own predicament. One might think that the substantiality of a deprivation resulting from the non-conformity of goods could be represented by the *gravity* of the goods’ defects. That is, the more defective the goods are, the more the buyer is deprived of his legitimate expectation. This idea is wrong: However defective the goods may be at the time of delivery, no substantial detriment will ensue if the seller promptly tenders a wholesome substitute. This makes sense: The availability of a remedy, not the gravity of initial defects, corresponds to the extent of the buyer’s economic loss. That is, the more easily a remedy is available, the less economic loss will fall on the buyer.<sup>57</sup> (Consider: Even if a machine made according to the buyer’s specifications stays dormant after the buyer turns on its power, the machine may be easily and quickly repaired by replacement of a simple part.) Thus, the substantiality of a deprivation actually depends on the availability of a reasonable remedy.

In challenge to the idea of incorporating availability of remedy into the substantial detriment test, one might rightly think that there are infinite degrees of remediability. To marshal this complication, this author suggests the following methodology: In Part V, this article considers the two

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commodity trade, any delay caused by packaging or repackaging the goods would lead to an unreasonable delay and expose the buyer to unreasonable risk.”).

56. Eduardo Grebler, *Fundamental Breach of Contract Under the CISG: A Controversial Rule*, 101 AM. SOC’Y INT’L L. PROC. 407, 409 (2007). Professor Zeller further pointed out that the term “detriment” in article 25 also “takes on substance within a particular context only, that is, within a contract.” ZELLER, *supra* note 7, ¶13.29.

57. See MELVIN A. EISENBERG, FOUNDATIONAL PRINCIPLES OF CONTRACT LAW 689 (2018) (explaining that to determine the applicability of avoidance, “four dimensions should be taken into account: the likelihood of future performance by the promisor, the economic significance of the breach, whether the breach was opportunistic, and the possibility of cure.”).

extremes on the spectrum of remediability—goods easily obtainable, resalable, or repairable, on the one hand, and goods irreparably defective on the other. There arises no substantial detriment in the former, and a judge can readily admit a fundamental breach in the latter.

Between these two ends, there are of course many sorts of remedies for defective goods that elude a definite categorization.<sup>58</sup> These nebulous cases will be extensively scrutinized in Part VI. In general, the most flagrant breach by the seller is non-delivery of the goods. However, problems concerning non-delivery or late delivery are excluded in the following analyses, with some exceptions, because they seldom raise a serious question of whether a deprivation was substantial.<sup>59</sup>

#### V. TESTING REMEDY AS A CRITERION: GOODS EASILY OBTAINABLE, RESALABLE, OR REPAIRABLE AND GOODS IRREPARABLY DEFECTIVE

As explained in the last section, I recommend evaluating availability of remedy through four categories of defective goods: (1) those that are easily obtainable or resalable, (2) those that are easily repairable, (3) those that are irreparably defective, and (4) those that are in between, *i.e.*, those that are possibly repairable or substitutable. In this part, the first three categories are considered. The fourth category, which requires extensive analysis, will be discussed in Part VI.

##### A. Easily Obtainable or Resalable Goods

A sales contract for commodities or fungible goods will not usually raise the issue of the substantiality of the seller's breach because the drawbacks of such a breach can usually be covered by a substitute contract, which buyers can relatively easily obtain upon a seller's breach. Professor Leisinger demonstrates this in his definition of "commodity":

The term "commodity" includes a broad field of products ranging from oil to bulk chemicals to wheat, corn, soybeans, rice, cotton, lumber, gas, propane, orange juice, RAM chips, copper, lead, gold, and even pork bellies. What all these goods have in common is that they are produced in very large quantities, by many different producers and that they are considered substitutable. They are

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58. For a thorough list of factors to be considered in determining a fundamentality of breach, *see generally* Koch, *supra* note 14.

59. This is because the buyer can extend the period of delivery by a reasonable length according to article 47(1), and, if the seller fails to deliver within that period, the buyer can avoid the contract under article 49(1)(b), without getting into the question of fundamental breach (or substantial detriment). CISG, *supra* note 1, art. 49(1)(b) ("The buyer may declare the contract avoided . . . in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.").

interchangeable. The broadest definition of commodities is “anything that has a use value.”<sup>60</sup>

He also explains the reasons why a breach of a commodity contract rarely becomes fundamental. First, as to a discrepancy of quantity, he states:

In the trade of commodities, where there are an almost unlimited number of substitutable sellers selling exchangeable goods. . . . [i]f the seller delivers a quantity less than the one contracted for, there can never be a fundamental breach of the contract. The reason for this is that in such a situation the buyer can always be expected to cure the defect himself by purchasing the missing quantity, for example, on the spot/cash market, and to then claim damages.<sup>61</sup>

The *Germany Computer Parts Case* is illustrative.<sup>62</sup> The buyer concluded a contract for the sale of eleven computer parts with the seller. The buyer was planning to use them to fulfil an order placed by his client. After delivery of five parts, the buyer refused payment and declared the contract avoided on the grounds that six parts remained undelivered. The German district court held that even the delivery of only five parts out of eleven would not entitle the buyer to avoid the contract in its entirety, because the buyer’s declaration of avoidance did not meet the requirement of CISG article 51(2), which provides, “The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.”<sup>63</sup> The court further held that in order to achieve the purpose of the contract in cases of a breach by the seller, the buyer may be expected to make a substitute transaction. Since it turned out that the buyer had already obtained the missing six parts by a substitute purchase before he avoided the contract, the court found that no fundamental breach was committed. The real reason for the buyer’s avoidance was the withdrawal of his client’s order.

This case is very instructive in three ways. First, a shortage of the agreed quantity was in fact held not to constitute a fundamental breach—in accordance with Professor Leisinger’s position reported above.<sup>64</sup> Second, the amount of the shortage as a proportion of the total order is not directly connected to the gravity of the breach. In the above case, six out of eleven parts were not delivered. The rate of failure was approximately 55%. This

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60. LEISINGER, *supra* note 55, at 114–15.

61. *Id.* at 126–27. However, a fundamental breach may occur if the buyer and/or the seller refuse substitution even though it can reasonably be made. These cases are discussed in Sections D and E of Part VI below.

62. Landgericht Heidelberg [LG] [District Court of Heidelberg], July 3, 1992, O 42/92 KfH I, translation available at <http://cisgw3.law.pace.edu/cases/920703g1.html> (last updated Mar. 20, 2007) (Ger.) (Computer Components Case).

63. CISG, *supra* note 1, art. 51(2).

64. See LEISINGER, *supra* note 55, at 126–27.



might seem sufficient to be recognized as a substantial deprivation of the buyer's legitimate expectations on a quantitative basis. However, the court rightly held that the breach was not fundamental, because, by the substitute purchase, the buyer's aim was attained. Third, this case shows that curability of breach can function as a proxy for the substantiality test, just as this article advocates.

As to a non-conformity of quality, Professor Leisinger explains, if the buyer purchased commodities for a particular purpose known to the seller, and if they cannot be used for this purpose, the buyer must purchase additional goods of the right quality and hence may avoid the contract.<sup>65</sup> However, he argues, if the buyer has not purchased the commodities for any particular purpose, but merely for the general purpose of resale, the buyer must not be allowed to avoid the contract as long as she can resell them.<sup>66</sup>

The *Switzerland Meat Case* is illustrative on this point.<sup>67</sup> The frozen meat that the seller delivered to the buyer, a wholesaler of meat, contained significantly more fat and water than the agreed standard and was estimated to be worth 25.5% less than the meat specified by the contract. The buyer argued that by the local food trade standard, a disparity of greater than 10% allows the buyer to avoid the contract. The Swiss Federal Supreme Court held that the gravity of a deviation of quality is not dispositive, and that whether further processing is possible and reasonable in the particular circumstances is relevant to the case's disposition. Furthermore, because the buyer was a wholesaler who could resell the meat in his usual course of business, without an unreasonable effort—albeit with a markdown—the Court denied avoidance.

### B. Easily Repairable Goods

In cases where non-fungible goods are involved, such as a machine made according to specifications provided by the buyer, a fundamental breach will rarely be identified if the defect of the goods is a relatively benign one which can easily or obviously be repaired. For example, even if a machine specifically designed for the buyer's production line stays dormant after turning on the power, it may be easily and quickly repaired by the replacement of a simple part. In that case, there is no fundamental breach and avoidance is inappropriate.

One such case is the *French Used Warehouse Case*, where the buyer declared the contract avoided because the metal parts of a portable

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65. The buyer must obtain substitute goods, but he will not have much difficulty in procuring them in the market so long as they are fungible. The same is true of the seller, who, in case of the avoidance by the buyer, can easily find another buyer. LEISINGER, *supra* note 55, at 129–30.

66. *See id.* at 130.

67. Bundesgericht [BGer] [Federal Supreme Court] Oct. 28, 1998, 4 C. 179/1998/odi, translation available at <http://cisgw3.law.pace.edu/cases/981028s1.html> (last updated Nov. 15, 2007) (Switz.) (Meat Case).

warehouse were defective.<sup>68</sup> The French Court of Appeal (Cour d'appel) held that "[s]ince that defect related to only part of the warehouse and concerned metal elements which could be repaired, it did not constitute a fundamental breach such as to deprive the buyer of what he was entitled to expect under the contract."<sup>69</sup>

### C. Irreparably Defective Goods

The two categories above concern cases where it is relatively obvious that the seller's non-compliance does not constitute a fundamental breach. We now turn to the cases where the converse is true: It is relatively obvious that the seller's non-compliance indeed constitutes a fundamental breach.

In some of these cases, the goods sold and delivered can be described as irreparably defective because their defects are so serious as not to allow for any use or cure. An example of defects falling into this category is present in the *Netherland Wheat Flour Case*.<sup>70</sup> The seller concluded a contract for the sale of wheat flour with the buyer, an international trading company. Upon delivery, it was confiscated by the authorities because the seller had added to the flour a bread-enhancing substance containing potassium bromate, an additive prohibited in the European Union as a genotoxic carcinogen. The buyer declared the contract avoided. The District Appeal Court in the Netherland found the seller's breach fundamental.

It is indisputable that the goods involved were irreparably defective. The wheat flour that the seller delivered to the buyer was confiscated by the authorities because it contained a prohibited substance. It is true that wheat flour is a kind of commodity or fungible good, and that both parties were trading companies, but the buyer could not possibly resell the goods confiscated by the authorities because of the ingredient causing cancer.

Another example is the *Germany Sport Clothing Case*.<sup>71</sup> The sportswear that the buyer had bought from the seller and resold to customers became distinctly smaller, shrinking one to two sizes, after being washed them for the first time. As a result, the end customers could no longer wear the

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68. Cour d'appel [CA] [regional court of appeal] Grenoble Apr. 26, 1995 93/4879, translation available at <http://cisgw3.law.pace.edu/cases/950426f2.html> (last updated Dec. 2, 2005) (Fr.) (Used Warehouse Case).

69. *Id.* See also, UNCITRAL, Digest of Case Law on the U.N. Convention on Contracts for the International Sale of Goods, at 115, art. 25, ¶9, (2016), [http://www.uncitral.org/pdf/english/clout/CISG\\_Digest\\_2016.pdf](http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf) [hereinafter UNCITRAL Digest] ("Some courts have held that easy repairability precludes finding a fundamental breach.").

70. Hof's-Gravenhage 23 april 2003, NJ 2003, 713 m.nt. (Rynpoort Trading & Transport NV et al/Meneba Meel Wormerveer B.V. et al.), translation available at <http://cisgw3.law.pace.edu/cases/030423n1.html> (last updated Jan. 19, 2005) (Neth.) (Wheat Flour Case).

71. Landgericht Landshut [LG] [District Court of Landshut] Apr. 5, 1995, 54 O 644/94, translation available at <http://cisgw3.law.pace.edu/cases/950405g1.html> (last updated March 20, 2007) (Ger.) (Sport Clothing Case).

clothes after washing; they were irreparably defective, with no room for cure.

Yet another example is the *Germany Used Shoes Case*.<sup>72</sup> The buyer, a company based in Kampala, Uganda, bought used shoes from the seller. The contract provided for delivery “FOB Mombasa, Kenya.” After the goods arrived at Mombasa, the buyer had the goods transported to Kampala, Uganda, where he examined them. Upon examination, the buyer discovered that the consignments contained only defective and unusable shoes and shoe storage accessories, including high-heeled shoes, inline-skates, and shoe trees. In addition, the Uganda National Bureau of Standards disapproved the import of the shoes because of their bad and unhygienic condition, recommending their destruction. The buyer declared the contract avoided. The District Court in Frankfurt found a fundamental breach by the seller.<sup>73</sup>

In these cases, in contravention of article 35 of the CISG,<sup>74</sup> the goods failed to comply with the specifications of their contracts and were not only unfit for ordinary purpose but also for *any* particular purpose. In other words, the defects were so serious as to make the goods entirely useless. In these circumstances, the pecuniary loss which the buyers suffered is not

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72. Landgericht Frankfurt [LG] [District Court of Frankfurt] Apr. 11, 2005, 12/26 O 264/04, translation available at <http://cisgw3.law.pace.edu/cases/050411lg1.html> (last updated Dec. 10, 2008) (Ger.) (Used Shoes Case).

73. However, the court denied relief on the ground that the examination of the goods and notice of non-conformity were too late and that the buyer was precluded from relying on non-conformity according to article 39(1). As to the details of this case and the irrationality of the decision, see Ishida, *supra* note 51, at 15–23.

74. See CISG, *supra* note 1, art. 35, which provides:

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

limited to the total loss of the proceeds the buyer had expected from the transaction, but it may also include the future loss of profit resulting from its vitiated reputation.<sup>75</sup> There is no doubt that the buyer had a right to avoid the contract.

The following quote from the UNCITRAL Digest pertinently sums up these findings:

Leading court decisions on what constitutes a fundamental breach . . . have held that a non-conformity concerning quality is not a fundamental breach of contract if the buyer can, without unreasonable inconvenience, use the goods or resell them, even with a rebate. Thus, *e.g.*, the delivery of frozen meat that contained too much fat and water . . . was deemed not to constitute a fundamental breach of contract because the buyer could resell the meat at a lower price or could process it in an alternative manner. If non-conforming goods cannot be used or resold with reasonable effort, however, there is a fundamental breach. The same is true where the goods suffer from a serious defect, even though they can still be used to some extent (*e.g.* flowers that should have flourished the whole summer but in fact did so only for a small part of the season), or where the goods have major defects and the buyer requires the goods for its manufacturing processes. Similarly, where the non-conformity resulted from the adulteration of the goods in a fashion that was illegal in the states of both the seller and the buyer, a fundamental breach was found.<sup>76</sup>

#### VI. IDENTIFYING A LINE IN THE SAND OF SUBSTANTIALITY: A GOOD FAITH DUTY TO CURE DEFECTS

This part tackles the most formidable problem for courts in identifying fundamental breaches: cases in which the gravity of a defect reaches a sufficient level that the buyer could invoke the right to declare the contract avoided, but in which the remediability of the defect cannot be easily determined. Generally, these cases involve goods which are neither easily obtainable, resalable, or repairable, nor irreparably defective. As Part V demonstrated, judges can readily deny a fundamental breach in the former case and affirm one in the latter. But between these two poles, there is chaos

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75. See Nicholas Whittington, *Reconsidering Domestic Sale of Goods Remedies in Light of the CISG*, 37 VICTORIA U. WELLINGTON L. REV. 421, 435 (2006) (In determining the fundamentality of breach the “economic loss of the nonbreaching party is likely to be the most prominent of these considerations. But, in addition, the question can encompass the consideration of factors such as loss of the nonbreaching party’s reputation. . . .”), available at <http://www.nzlii.org/nz/journals/VUWLawRw/2006/20.html>.

76. UNCITRAL Digest, *supra* note 69, at 222, art. 46, ¶13, (2016), [http://www.uncitral.org/pdf/english/clout/CISG\\_Digest\\_2016.pdf](http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf).

in which judges will have a hard time determining whether the breach has caused substantial detriment.

It seems next to impossible to formulate a criterion capable of consistent application. Once judges have decided to acknowledge substantial detriment, they can itemize those facts in their case which tend to justify avoidance. Once they have decided no detriment is present, they will hold that the aggravating factors that the buyer's lawyer has enumerated are insufficient to form a fundamental breach. In general, those decisions cannot help becoming arbitrary because there is no universal, objective criterion, and there are innumerable kinds of factors, from manifold transactions, that may or may not contribute to substantial detriment. The presence of substantial detriment depends on so many parameters as to freeze any attempt at clear-cut definition.

Yet if we look more abstractly, removing ourselves from the dismaying complexities in this middle field, we will find that the kernel of the problem is technical rather than legal. This is where this article offers a solution: The quandary of what constitutes a substantial detriment can be overcome by the substitution or repair of goods. If a malfunctioning machine has been successfully repaired, there is no substantial detriment and hence the buyer has no grounds for avoiding the contract. If such an attempt has failed, then, depending on how much it accomplished, the buyer may have no choice but to avoid the contract.

Unfortunately, however, there is no provision in the CISG which obliges the parties to attempt to cure a shipment's defects. One of the relevant provisions, article 46(2), says that "the buyer *may* require delivery of substitute goods."<sup>77</sup> Another relevant provision, article 48(1) says, "the seller *may* . . . remedy . . . any failure to perform his obligations."<sup>78</sup> Literally read, these provisions imply that the parties do not necessarily have to attempt to cure the defects. The CISG Advisory Council in its opinion No.5 advocated, "There is no fundamental breach where the non-conformity *can* be remedied either by the seller or the buyer without unreasonable inconvenience to the buyer or delay inconsistent with the weight accorded to the time of performance."<sup>79</sup> However, even if the non-conformity *can* be remedied in a reasonable manner, the seller and the buyer *may* leave it as it is. What if the seller *can* remedy the non-conformity, but he will not? Is the buyer precluded from avoiding the contract because there is no fundamental breach so long as the non-conformity *can* be remedied?

The discussion that follows demonstrates that the obligation to remedy *is* imposed both on the seller and the buyer under CISG articles 25, 46(2)

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77. CISG, *supra* note 1, art. 46(2) (emphasis added).

78. *Id.* art. 48(1) (emphasis added).

79. Opinion no. 5 of the CISG Advisory Council, The Buyer's Right to Avoid the Contract in Case of Non-Conforming Goods or Documents (May 7, 2005), *reported by* Ingeborg Schwenzer, Professor of Private Law at University of Basel (emphasis added).

and (3), and 48(1), buttressed by the good faith principle provided in article 7(1).

*A. Possibility of Cure and the Right of the Buyer to Avoid*

As discussed above, article 49 provides in part: “The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract.”<sup>80</sup> Courts and commentators generally agree that initial defects of goods do not constitute a fundamental breach that entitles the buyer to avoid the contract, if there is a possibility that the seller can remedy those defects.<sup>81</sup> Further, one of those commentators writes:

The result is the same if the view is taken that the buyer’s right to avoid is suspended so long as substitute delivery or cure is possible and genuinely offered and the time needed to make substitute delivery or to repair will not in itself lead to a fundamental breach by exceeding the contractually-agreed date for delivery.<sup>82</sup>

The rationale of this opinion is based on the idea that, however serious a breach may be initially, so long as it is curable, it does not substantially deprive the buyer of his legitimate expectations and hence is not qualified as a fundamental breach. In other words, “the preconditions for a fundamental breach of contract (articles 25 and 49(1)(a)) generally do not exist as long as the preconditions” of remedial measures are met.<sup>83</sup> This opinion is based on three assumptions. The first is that whether the cure is actually possible can be determined at the time of delivery or shortly after it. Second is that the cure is reasonably practicable with moderate cost and time. Third is that the parties will undertake to cure.

The opinion appears to be basically correct as a matter of law, but, as the CISG has been commonly understood until this point, two of these three assumptions about the availability of cure are suspect. First, in cases where fundamentality of breach is questioned, whether a defect is reasonably curable cannot always be judged at the time of delivery. In some cases, it cannot conclusively be determined until the seller’s attempts to cure are borne out. If the attempts turn out to be futile, the buyer will have unduly been waiting for nothing, suspending its right to avoid in vain. In other words, what seemed to be curable defect at first was not curable in fact. The buyer could have avoided immediately after the delivery and arranged for a cover purchase. On these grounds, this approach lacks a supplementary theory which justifies obliging the buyer to wait.

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80. CISG, *supra* note 1, art. 49(1).

81. Schroeter, *supra* note 12, at 445–46, ¶ 47.

82. *Id.*

83. Markus Müller-Chen, *Article 48*, in SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 770, ¶ 18.

Second, there appears to be no provision of the CISG, read alone, that obliges the buyer and seller to attempt to cure the defects. Article 48(1) provides that the seller “may” remedy his failure to perform.<sup>84</sup> In ordinary meaning, the auxiliary verb “may” implies that the seller does not necessarily have to cure if he does not so wish. Maybe he will, or maybe he will not, even if at the time of delivery, the defect is clearly and definitely curable with minimum cost, within a reasonable time. In the same vein, article 46, sections (2) and (3) provide that the buyer “may” require the seller to deliver substitute goods or to repair defective goods.<sup>85</sup> The buyer does not necessarily have to do so if he does not so wish. Maybe he will require remedy by the seller, or maybe not if he wishes to avoid the contract.

A drastic remedy like avoidance should not depend on such indeterminate and unforeseeable conduct by the parties. If measures for cure are to survive an immediate avoidance by the buyer, we need to contrive interpretations of the relevant provisions of the CISG which will oblige the seller and the buyer to attempt to remedy the seller’s non-compliance. Moreover, an obligation to cure may dispense with troubles and burdens for the seller entailed in the avoidance by the buyer. For in case of avoidance, the seller not only misses the profit he expected from the sale but also must bear the cost of storing the rejected goods and taking them back, and he might also have to pay expectation damages to the buyer.

There are two issues relevant to this inquiry: the buyer’s right to require the seller to cure the lack of conformity, and the seller’s right to offer to remedy his failure. In the following sections, we will examine these rights and convert them into obligations, with the help of the principle of good faith.

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84. See CISG, *supra* note 1, art. 48(1), which provides:

Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

85. See CISG, *supra* note 1, art. 46, which provides:

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

### B. Buyer's Right and Obligation to Require Repair

The buyer's request to remedy can be fulfilled in two ways: substitution or repair. For the sake of relative simplicity of explanation, we will deal with the latter first. Article 46(3) provides in relevant part:

If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances.<sup>86</sup>

As explained above, this provision does not oblige the buyer to require the seller to repair the lack of conformity of the goods.<sup>87</sup> He *may* require the repair by the seller, and if he chooses to so require, such a request is conditioned on the repair's reasonableness under the circumstances.<sup>88</sup>

It is to be noted that this buyer's option to request repair is present in all the cases where the goods do not conform to the contract, not just in the case of a possible fundamental breach.<sup>89</sup> However, relevant to our current inquiry is the case in which the lack of conformity does appear to be a fundamental breach, and in which it is disputed whether the buyer can resort to an immediate avoidance. For this inquiry, at first, we need to examine when a request for repair "is unreasonable having regard to all the circumstances."<sup>90</sup> When considering whether a request is unreasonable:

[I]t is necessary to weigh the buyer's interests in repair against the seller's expenses. If there is an objective disparity, repair is unreasonable. This is the case in particular when the repair is unreasonably expensive for the seller: the costs of repairing the goods are disproportionately higher than the costs of acquiring a substitute. . . . If the seller is a wholesaler or retailer and thus does not have the technical, mechanical, or other skills necessary for the repair, and if it is not easily possible for him to have a third party

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86. CISG, *supra* note 1, art. 46(3).

87. In the case of some minor defects, the buyer himself may fix it, or he may arrange for repair by employing an expert in his vicinity, possibly at lower cost, and then demand compensation for the cost from the seller. *See* HONNOLD, *supra* note 28, at 414 (discussing art. 46, § 284) ("Some minor repairs can be made more readily by the buyer, particularly when the seller's facilities for repair are in a distant country. The statutory language was designed to encourage a reasonable and flexible approach to such cases.").

88. CISG, *supra* note 1, art. 46(3) ("unless this is unreasonable having regard to all the circumstances").

89. For example, article 35 of the CISG is the general provision for the conformity of goods, requiring the goods to be of the quantity, quality and description specified by the contract. *See* CISG, *supra* note 1, art. 35. For full text of Article 35, see *supra* note 74. Likewise, article 45 provides in part: "If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may (a) exercise the right provided in articles 46 to 52." The fundamentality of breach is not prerequisite to the request of repair by the buyer under article 46(3). *See supra*, text accompanying note 86.

90. *Id.*



do the work ([e.g.,] a contact repair centre), then repair is unreasonable.<sup>91</sup>

Suppose a case where the fundamentality of breach is at issue and the reasons a repair might be unreasonable all are absent. In other words, the precondition of reasonableness of repair is satisfied. What shall the buyer do? He can choose to declare the contract avoided, because article 46(3) says that he *may*; he does not have to require repair. True, if he does choose not to ask for repair and to avoid the contract, he may have a duty to mitigate damage to the seller.<sup>92</sup> However, all article 77 can do with this kind of avoidance is to allow the breaching seller “to claim a reduction in the damages in the amount by which the loss should have been mitigated.”<sup>93</sup> It does not have the direct effect of prohibiting the buyer from relying on the breach to declare the contract avoided. Yet an avoidance by the buyer under this situation smacks of opportunism.

In my opinion, the principle of good faith, imported from CISG article 7(1), prohibits the buyer in the above circumstances from avoiding the contract, and hence he *is obliged to* require the seller to repair. But I acknowledge that good faith is an amorphous notion, and we should not lightly resort to it. In the next section, the notion of good faith is examined in the context of a buyer’s request for repair.

### C. Principle of Good Faith in the Context of Article 46(3)

The provision of the CISG that imposes the good faith obligation is article 7(1), which says, “In the *interpretation* of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the *observance of good faith* in international trade.”<sup>94</sup>

In determining the content of the amorphous notion of good faith, the official record of article 7(1), *i.e.*, the “*travaux préparatoires*[,] arguably are

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91. Markus Müller-Chen, *Article 46*, in SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 751, ¶ 40.

92. Sometimes a repair by the buyer himself is required to mitigate damages. See Victor Knapp, *Article 77*, in VIENNA COMMENTARY, *supra* note 5, at 563–64.

93. CISG, *supra* note 1, art. 77 (“A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.”). See also Ingeborg Schwenzer, *Article 77*, in SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 1105, ¶ 2 (“The duty to mitigate damages is not an enforceable obligation under the contract, but rather a non-actionable duty to be taken in the aggrieved party’s own interest. Failure to comply with the duty to mitigate damages does not result in the aggrieved party’s liability for damages, but rather precludes recovery of any loss which could have been avoided.”).

94. CISG, *supra* note 1, art. 7(1) (emphasis added).

predominantly of historical interest” only,<sup>95</sup> rather than of practical use of reference. What is worse, the case law on article 7(1) gives little guidance. Professor Sheehy describes the judicial situation:

The tangle of cases seems to be making the waters ever murkier as the various panels and courts continue to introduce patches of domestic law and cobble together resolutions using the term “Good Faith” without explaining its content or meaning in applications—it being variously described as a general principle, a principle with specific substance, or simply one of many things that makes one party’s position more favourable to [one] adjudicator than another. It may be that this mash of ideas more accurately reflects the reality of judicial reasoning, but it certainly makes the merchant and the legal advisor’s job more difficult. Without a single unifying concept, arbitrary though it may be, the notion of Good Faith is a nebulous notion probably causing more grief than it resolves, introducing more uncertainty without the corollary benefit of improving justice or fairness.<sup>96</sup>

In addition, as Sheehy’s analysis suggests, we cannot resort to analysis of comparable domestic law, which would undermine the “international character” of the Convention.<sup>97</sup> With no interpretive guidance, what is left for us is no more than the phrase, “good faith.” We can but resort to the definition of a dictionary. The Oxford English Dictionary defines the phrase as “fidelity, loyalty . . . ; esp. honesty of intention in entering into engagements, sincerity in professions.”<sup>98</sup>

With this definition in mind, how is the obligation of good faith to be used in the context of the CISG? Good faith, connoting “honesty of intention” or “sincerity in professions,” functions as an “overarching principle”<sup>99</sup> and can be utilized in an auxiliary way to finish tailoring interpretations of other, more explicit provisions of the CISG. Prevention of opportunistic avoidances should be regarded as part of article 7(1)’s good faith principle because it is necessary to complete one of the general principles of article 7(2)<sup>100</sup>—keeping the contract alive.<sup>101</sup> UNCITRAL Digest explains:

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95. Bruno Zeller, Four-Corners—The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods, at 102 (May 2003) (unpublished PhD thesis, University of Melbourne), <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html> (last visited Dec. 17, 2019).

96. Benedict Sheehy, *Good Faith in the CISG: The Interpretation Problems of Article 7*, in REV. OF THE CISG 2005-2006 153, 193–96 (Pace Int’l L. Rev. ed. 2007).

97. Article 7(1) provides in part: “In the interpretation of this Convention, regard is to be had to its international character.” CISG, *supra* note 1, art. 7(1).

98. *Good faith*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

99. Sheehy, *supra* note 96, at 187.

100. CISG, *supra* note 1, art. 7(2):

[T]he Convention is based upon the *favor contractus* principle, pursuant to which one should adopt approaches that favor finding that a contract continues to bind the parties rather than that it has been avoided. This view has also been adopted in case law. One court expressly referred to the principle of *favor contractus*, while one stated that the Convention's general principles "provide a preference for performance."<sup>102</sup>

The principle of good faith comes on the scene when an avoidance is suspected to be an opportunistic one. Such an avoidance lacks "honesty of intention [and] . . . sincerity in professions."<sup>103</sup> As is shown in the following example, an opportunistic avoidance is an avoidance which has no or only a dubious grounding in the contract and in law, and which is declared to prevent loss or to gain profit from changed circumstances after the conclusion of the contract—*i.e.* in those circumstances when the avoiding party is better off avoiding than adhering to the contract:

Between the making of the contract and the time for performance there may be wide swings in commodity prices. For example, from September to November 1969, the price of beans rose from \$180 to \$260 per long ton, an increase within two months of 44.4%. Comparable dislocations result from swings in the value of currency. In five days following 24 July 1978, the value of the U.S. dollar in Tokyo dropped from 200.10 to 192.10 Yen; a \$1,000,000 contract entered into on July 24, to be paid five days later, would have involved a loss of 8 million Yen.

In such settings, the losing party views the contract with regret and tends to look with a sharp eye to every aspect of the other's performance.<sup>104</sup>

In such a situation, the good faith principle can function to forestall an expedient avoidance by the buyer, obliging him to have any non-compliance remedied.

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Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

101. UNCITRAL Digest, *supra* note 69, art. 7, ¶ 32, at 45.

102. *Id.* See also ZELLER, *supra* note 7, ¶ 13.06:

The basic motivation of the CISG is to keep the contract alive as long as possible, as the convention has recognized that cancelling a contract in international trade is difficult and should be the remedy of last resort because it triggers the winding back of associated contracts such as letters of credit. If any cure will prevent an avoidance of a contract, the courts generally will so rule.

103. OXFORD ENGLISH DICTIONARY, *supra* note 98.

104. Michida, *supra* note 10, at 279.

Some will argue that, beginning with the phrase “In the interpretation of this Convention,” article 7(1) on its face restricts the observance of good faith to the *interpretation* of the CISG and seems not to directly govern the conduct of the parties.<sup>105</sup> After all, it is mainly judges who *interpret* the CISG and hence who must evaluate the need to promote the observance of good faith. But, take a step back: Article 7(1) is likely *not* a precept requiring honesty or sincerity from a judge sitting on a CISG case and interpreting its provisions.<sup>106</sup> It would itself be absurd for any law to include a redundant admonition for adjudicators not to make an absurd interpretation. That would be like a public facility posting a sign prohibiting tigers on its front door beside a no-dog sign.

Instead, it is “logically impossible to apply good faith to the Convention as a whole without influencing or affecting the behavior of the parties.”<sup>107</sup> Article 7(1) requires a judge to scrutinize the conduct of the parties in interpreting provisions of the CISG, because a judge never interprets a provision abstractly but in terms of the facts of a concrete case for which he is sitting. Those facts include the modes of conduct of the parties.<sup>108</sup> Notice that if a judge were to interpret a provision of the CISG to condone a bad faith behavior by a party, that interpretation would be against the principle of good faith. The view that good faith “is not to be limited to the interpretation of the CISG itself is held by the majority of commentators.”<sup>109</sup>

However, even as article 7(1) was being negotiated, delegates rightly contended that the untrammelled application of an obligation of good faith will lead to uncertainty and unpredictability.<sup>110</sup> Therefore, it is desirable to connect the duty of good faith in article 7(1) with other explicit provisions of the CISG.<sup>111</sup>

Let’s start with article 46(3). In Section B of this part, we saw that the buyer’s ability to request repair under article 46(3) is conditioned on the

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105. As Professor Neumann argues, “good faith is understood as an instruction not to read the Convention in a strict literal or absurd way.” THOMAS NEUMANN, *THE DUTY TO COOPERATE IN INTERNATIONAL SALES: THE SCOPE AND ROLE OF ARTICLE 80 CISG* 28 (2012).

106. See Mark Gergen, *The Principle of Good Faith in Contract Law*, in EISENBERG, *supra* note 57, at 708 (“Good faith means sincerity in its Latin form *bona fide*.”).

107. Zeller, *supra* note 95, at 102.

108. See Koch, *supra* note 14, at 207 (“In practice, it appears to be nearly impossible to apply this principle to the interpretation of the Convention without also applying it to the parties’ conduct.”).

109. Sheehy, *supra* note 96, at 165–66.

110. The good faith principle in article 7(1) is a product of compromise between the delegates who esteemed fair dealing of the parties and those delegates who feared its ambiguous notion would lead to uncertainty. See HONNOLD, *supra* note 28, at 134, art. 7, § 94.

111. See Sheehy, *supra* note 96, at 167–68 (“It is not a substantive doctrine then to be read into all contracts as an implied term, but a guide to thinking about whether and how other terms should be read in to a contract, or applied to a particular fact pattern.”).

absence of unreasonableness (“unless this is unreasonable having regard to all the circumstances.”).<sup>112</sup> The interpretation that article 46(3) *obliges* the buyer to require the seller to repair is buttressed by the good faith principle. Consider: When, taking account of all the circumstances, repair would be reasonable, the buyer’s choice not to repair and to instead avoid seems irrational and motivated by some reason external to the contract at hand. Take, for example, a situation in which a machine that the buyer ordered has turned out to be seriously flawed, but the seller is able and willing to repair it in a relatively short time with moderate cost and in compliance with other conditions of reasonableness. If the buyer, who has no special interest in rigid punctuality of delivery, refuses an offer by the seller to repair, the refusal smacks of an opportunistic avoidance in which the buyer takes advantage of the defects as a pretext (*e.g.*, the opportunity to purchase a machine at a lower price which has better or comparable specifications). Such an attempt lacks “honesty of intention” or “sincerity in professions” on the part of the buyer and is contrary to the *favor contractus* principle of article 7(2). Thus, the principle of good faith of article 7(1), in collaboration with the general pro-contract principle of article 7(2), obliges the buyer to require the seller to cure.<sup>113</sup>

#### D. Buyer’s Right and Obligation to Require Substitute Goods

The buyer’s right to require substitute goods is provided in article 46(2), which reads:

If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.<sup>114</sup>

Can the buyer immediately declare the contract avoided before requiring substitute goods on the ground that a non-conformity is a

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112. CISG, *supra* note 1, art. 46(3).

113. A district court in Italy, in a case involving a defective machine, once stated that avoiding the contract without granting a seller the opportunity to cure defects in the goods is contrary to the principle of good faith which governs international transactions. *See* Trib. di Busto Arsizio, 13 Dec. 2001, n.1192, *translation available at* <http://cisgw3.law.pace.edu/cases/011213i3.html> (last updated Nov. 12, 2012) (It.) (Machinery Case); *see also* Sheehy, *supra* note 96, at 186–87.

114. CISG, *supra* note 1, art. 46(2). This provision is mainly meant for commodities or fungible goods, along with goods that are mass-produced or for which replacements are otherwise readily available. *See also*, Peter Huber, *Article 46*, in UN COMMENTARY, *supra* note 16, at 682 (“Art. 46(2) entitles the buyer to claim delivery of substitute goods. This means that the seller has to make a new tender of goods which conform to the contract. This will usually not create major problems where generic goods are the subject matter of the contract (*e.g.* oil, sugar, grain).”).

fundamental breach?<sup>115</sup> Unlike article 46(3) concerning repair, article 46(2) does not impose a condition of reasonableness or feasibility on substitution. And, in many cases, substitution “will cause hardship to the seller. He must not only take back the delivered goods but also deliver substitute goods, which necessarily involves the risk of damages or loss and expenses such as transportation and storage.”<sup>116</sup> And the buyer can often more readily procure the same goods from another source. In such cases, it may be reasonable for the buyer not to require the seller to tender a substitute.

The auxiliary verb “may” seems to imply that in some cases the buyer does not have to require substitution and he can avoid the contract. However, where the factors which make substitution unreasonable are absent, as in the case of fungible goods readily delivered, the principle of good faith acts to ensure that the buyer is not allowed to avoid the contract but rather obliged to require substitution, by the same rationale explicated on repair.

*E. Seller's Right and Obligation to Remedy His Failure and  
Cross-Reference to Article 49*

1. Seller's Right and Obligation to Remedy His Failure

Now it has been demonstrated that the principle of good faith obliges the buyer to require the seller to remedy his failure to perform, if certain conditions of reasonableness are met. It is time to establish the seller's obligation to remedy under the same principle. It is better to quote here again the full provision of article 48(1):

*Subject to article 49*, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.<sup>117</sup>

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115. A separate problem is whether buyers can correctly judge the fundamentality of a breach. See Michael Will, *Article 46*, in VIENNA COMMENTARY, *supra* note 5, at 337 (“The buyer had to decide whether there was a breach of contract, and assume the risk of a wrong decision on that point. Under Article 46(2) of the Convention he has a second decision to make, namely whether the breach is a fundamental one. The risk of error on this second decision is much greater because the question is more subtle.”). As we will discuss in Part VII, this uncertainty may be resolved when both parties collaborate to cure.

116. Koch, *supra* note 14, at 332.

117. CISG, *supra* note 1, art. 48(1) (emphasis added).

Let us put aside for a moment the cross-reference, “Subject to article 49,” because it involves a daunting problem and has been a target of controversy among commentators and scholars.

Focus instead on the fact that, here again, the seller *may* remedy his own failure to perform. The auxiliary verb “may” continues to connote that the seller does not have to take this action if he does not want to. If he decides not to remedy, the buyer will have the opportunity to avoid the contract. However, the seller is not acting in a vacuum. Recall that applying the good faith principle in our interpretation of articles 46(2)–(3), the buyer is obliged to require the seller to remedy if all the conditions of a reasonable and feasible remedy are met. Similar factors restrict when the seller may remedy under article 48(1), limiting seller’s opportunity to remedy to situations where “he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer.” But just as under article 46, if the requirements of reasonableness on both parties are fulfilled, the seller’s rejection of the opportunity to remedy will manifestly show his lack of honesty of intention or sincerity in professions. Applying the principle of good faith, the seller will be driven into a tight corner where he is obliged to remedy.

## 2. Cross-Reference to Article 49

Here, we come back to what we have put aside (specifically, the formidable cross-reference “Subject to article 49”), as it is relevant to much of what we have discussed above. At the Diplomatic Conference in Vienna in 1980, the cross-reference replaced the clause, “Unless the buyer has declared the contract avoided.”<sup>118</sup> Professor Honnold explains:

[The] “[u]nless” clause might be construed to authorize avoidance of the contract that would frustrate the seller’s right to cure. There was widespread agreement that whether a breach is fundamental should be decided in the light of the seller’s offer to cure . . . and that the buyer’s right to avoid the contract (Art. 49(1)) should not nullify the seller’s right to cure (Art. 48(1)). However, it was difficult to find language that would clearly express the proper relationship between avoidance and cure. Finally, the Conference adopted a joint proposal prepared by delegates who had been anxious to protect the seller’s right to cure. Under this proposal, the “Unless . . .” clause of the 1978 Draft was deleted and replaced by the present cross-reference to Article 49.<sup>119</sup>

If article 48(1) had retained the clause, it would be clearer that the buyer’s right to avoid trumps the seller’s right to cure. Instead, the drafters’

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118. See HONNOLD, *supra* note 18, at 686-87.

119. See HONNOLD, *supra* note 28, at 426.

replacement with the cross-reference to article 49 implies that there are cases where the buyer's right to avoid must give way to the seller's right to cure.

Professor Will explains the still-unsettled problem:

The condition of non-avoidance raises the fundamental issue of whether avoidance or cure should prevail. This question cannot be answered with certainty, since the words "subject to Article 49" are no clearer than the former "unless" clause which they replaced. The relationship between article[s] 48 and 49 remains unsettled. Here the interests of buyers and sellers clash so strongly that it seems almost impossible to find a proper balance. In fact, the issue has long been one of the most controversial in international sales law.<sup>120</sup>

As explicated in Section A of this part, courts "have frequently held that a curable defect of the goods does not in itself amount to a fundamental breach, if there is the possibility that the seller may cure,"<sup>121</sup> and most commentators agree. On the other hand, if we read the cross-reference literally and

[give] these words their ordinary and plain meaning, it appears that the buyer's right to declare the contract avoided in accordance with article 49(1)(a) prevails over the seller's right to cure. The determination of fundamental breach in the light of any offer to cure, however, would enable the seller to prevent the buyer from avoiding the contract and would, therefore, actually allow the seller's right to cure to prevail over the buyer's right to avoid.<sup>122</sup>

The disparity of these two opposing views seems to lie in the difference in the time during which a fundamental breach is identified. While the former view grants a grace period for attempts to cure, the latter seems to envision an avoidance declared immediately after the delivery or inspection reveals defects, denying any grace period. The shortcoming of the literal view is that it freezes the state of the defective goods as it is at delivery, excluding any possibility of cure. However, even a defective machine that does not turn on may be easily and quickly repaired by a replacement of simple parts, just as a decayed crop may be readily substituted with a wholesome one. The latter view fails to rationalize its blatant disregard of this possibility—and of the drafting history which changed the "unless" clause to a cross-reference.

Here, it would be best for us to appreciate what article 49 says. It says, "The buyer may declare the contract avoided," if non-conformity of goods amounts to a fundamental breach. It does not say, "The buyer may avoid the

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120. Michael Will, *Article 48*, in VIENNA COMMENTARY, *supra* note 5, at 349.

121. Schroeter, *supra* note 12, at 445, ¶47.

122. Koch, *supra* note 14, at 323.



contract.” Why does it bother to say the buyer may *declare*? One possible interpretation is that the buyer cannot by himself conclusively determine whether a breach qualifies as fundamental, *i.e.*, whether the breach substantially deprives him of his legitimate expectations. To make an objective determination of fundamentality is very difficult, even for courts and scholars. The buyer’s assessment may well be subjective and arbitrary: What appears to be a fundamental breach for the buyer may be curable by the seller, and hence the seller can turn it into a non-fundamental breach. The buyer may also change his judgement regarding the fundamentality of the breach in a remedial negotiation with the seller. Article 49(1) implies to the buyer, “You may regard the breach as fundamental and declare the contract avoided, but it may turn out to be curable afterward.” Ultimately, it is a court that makes the final call.<sup>123</sup>

Thus, the CISG leaves the initial judgement of fundamentality of breach to the declaring party, and that judgement may later be corrected. This interpretation also applies to article 46(2), which says, “If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a *fundamental breach* of contract.”<sup>124</sup> In the absence of this interpretation, it may seem “paradoxical that the buyer’s right to require delivery of substitute goods is available only if there has been a fundamental breach of contract, [when] the fundamental nature of the breach exists only if the defect has not been remedied by the seller under Article 48 by delivery of substitute goods.”<sup>125</sup>

This paradox is resolved by an interpretation that the first assessment of fundamentality is made by the buyer, and that his assessment of fundamentality of breach can be rebutted by the seller’s capability and willingness to tender a substitute. Even if the defect is so serious as not to allow for repair, but the seller can and does replace the defective goods with sound goods, the breach ceases to be fundamental. If the seller is unable to tender a substitute or to repair, the breach remains fundamental, and therefore the buyer can avoid the contract. Under the theory by this author, the buyer has an obligation to require the seller to cure and the seller has an obligation to offer to cure.

As we will see in the next part, the buyer and the seller must make collaborative efforts to cure defects. The CISG grants a grace period to the final determination of fundamentality of breach. During the period, the

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123. If the buyer has wrongfully declared the contract avoided and quit performance, he himself may be held liable for a fundamental breach. For a U.S. domestic case illustrating this issue, see *Walker & Co. v. Harrison*, 81 N.W.2d 352, 355 (Mich. 1957) (“But the injured party’s determination that there has been a material breach, justifying his own repudiation, is fraught with peril, for should such determination, as viewed by a later court in the calm of its contemplation, be unwarranted, the repudiator himself will have been guilty of material breach and himself have become the aggressor, not an innocent victim.”).

124. CISG, *supra* note 1, art. 46(2) (emphasis added).

125. Markus Müller-Chen, *Article 46*, in SCHLECHTRIEM & SCHWENZER, *supra* note 12, at 746, ¶ 28.

buyer and the seller collaborate to make a final assessment of the curability of the defect: If it is cured, there is not a fundamental breach, and if it is not, there remains a fundamental breach and the buyer can avoid the contract. Under this interpretation, the cross-reference does not mean that the buyer can avoid the contract even though the defect can reasonably be cured. It is a confirmatory reference, meaning the buyer retains the right to avoid the contract if reasonable efforts to cure have turned out to be a failure.

#### VII. COLLABORATIVE EFFORTS TO CURE DEFECTS BY THE SELLER AND THE BUYER: MAKE THEM DRAW A LINE

Some commentators argue for the existence of a general principle of cooperation between parties in the CISG.<sup>126</sup> In the same vein, the present author advocates that there exists a principle of collaboration to cure between the parties in the CISG. In this author's interpretation of articles 7(1)(2), 25, 46 (2)(3) and 48(1), the seller is obliged to offer to cure, and the buyer is obliged to require the seller to cure, non-conformity of the goods if the conditions of reasonableness are met. The logical conclusion of this interpretation is that the seller and the buyer should, in collaboration, attempt to remedy non-conformity. "A policy that permits cure of breach and generally fosters further dealing between the contracting parties after contract breakdown, and which leaves the injured party whole, is . . . desirable."<sup>127</sup> Such policies, like my own, will obviate substantial detriment and save waste. Therefore, they represent rational economic behavior.

Naturally, and as noted in articles 38<sup>128</sup> and 39,<sup>129</sup> it is the buyer that first discovers non-conformity and informs the seller of it. Then, the seller, who is more likely to have knowledge about the goods and their defects, will usually advise the buyer about the nature of the defects. They will discuss and negotiate how to deal with the problem. Feasibility of cure is a question which entails diverse factors and forecasts, such as the degree of difficulty of substitution and repair, probability of success, time needed, cost involved

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126. See NEUMANN, *supra* note 105, at 110 ("The principle of cooperation between the parties exists in the Convention and is expressed in many provisions."). Professor Neumann argues that the principle of cooperation is embodied in (among others) the rules of communication of information provided in Articles 39(1), 48(2), 65, and so on. See *id.* at 110–16.

127. Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 555 (1976).

128. See CISG, *supra* note 1, art. 38 (providing in part: "(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.").

129. See CISG, *supra* note 1, art. 39 (providing in part: "(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.").

and so forth. These forecasts normally belong in the domain of the seller's expertise, and therefore it is up to the seller to make an initial decision. The buyer may make his own decision in response, taking account of the time and expense necessary for cure, the possibility of alternative deals, and so forth.

The scope of this collaboration is not totally autonomous, but, as noted above, is bounded by the explicit conditions imposed by relevant articles of the CISG. These conditions are important in that they infuse reasonableness and objectivity into the parties' solution. The condition imposed on the buyer's right to request repair in article 46(3) is "unless this is unreasonable having regard to all the circumstances." The three conditions on the seller's right to attempt remedy in article 48(1) are "without unreasonable delay, unreasonable inconvenience, and uncertainty of reimbursement."<sup>130</sup> When the seller and buyer interact, the two sets of conditions are jointly imposed on their cooperation. (The buyer's condition, *i.e.*, the absence of unreasonableness, has catch-all characteristics which can embrace the three conditions imposed on the seller's offer to remedy.)

Professor Honnold cogently illustrates the steps which sensible merchants would take to cure a defect of goods:

Let us suppose that . . . on June 1, shortly after arrival of the goods, Buyer emailed: "Machine does not operate[,] apparently because of a defect in Part X. Will you remedy the defect? Must have machine in working order by June 20 or will be forced to avoid contract and obtain machine elsewhere. Need to know by June 10 what you plan to do with respect to arrival of your engineer and plans for repair."

Such a message would respond to the parties' normal commercial interests to maintain a productive business relationship. . . . This advanced stage of the relationship between the parties, with the buyer in possession of defective goods shipped by the seller, leads to the conclusion that the seller also has the "obligation" to respond to the buyer's request for early information regarding the seller's plans concerning cure. . . . When cure of a defect is feasible[,] the seller will be anxious to effect the cure to preserve good business relationships and also to minimize the loss resulting from avoidance of the contract. The point . . . is to suggest that the buyer need not be consumed by doubt over whether the seller will cure the defect; a simple inquiry will provide the answer.<sup>131</sup>

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130. For detailed explication about these conditions, *see generally* Peter Huber, *Article 48, in UN COMMENTARY supra* note 16, at 698.

131. HONNOLD, *supra* note 28, at 427–28, art. 48, § 296; *see also* Markus Müller-Chen, *Article 48, in SCHLECHTRIEM & SCHWENZER, supra* note 12, at 769, ¶ 16 ("[I]t must be pointed out that the dogmatic difficulties in the relationship between the seller's right to remedy by subsequent performance and the buyer's right to avoid the contract occur primarily

In answering the buyer's inquiry, the seller may sometimes provide a reasonable assurance to the buyer that cure is feasible<sup>132</sup> and may make a price-reduction agreement. Thus, the feasibility of cure is the watershed which divides a non-fundamental breach and a fundamental one. If cure is feasible and a collaborative, good faith attempt to remedy has succeeded, there exists no fundamental breach. If the seller refuses to cure for no valid reason or is indolent in attempting to cure, the defect amounts to a fundamental breach, and the buyer can declare the contract avoided. Likewise, if a cure is not feasible or sincere attempts to cure have turned out to be fruitless, then the breach is qualified as fundamental, substantially depriving the buyer of his legitimate expectations. If the buyer refuses seller's sincere offer to cure when cure is feasible, the breach is not qualified as fundamental, and if the buyer declared the contract avoided, he himself may be liable for a fundamental breach. Although these results might be unforeseeable at the time of conclusion of the contract (preventing the contract from being avoided according to the foreseeability test), non-avoidance in this situation adds insult to injury: At the time the contract is concluded, reasonable merchants will have a tacit assumption that some of the goods they deal in will need to be repaired and that attempts to repair may sometimes fail.

In practice, this aligns with how courts treat failed attempts to cure. The *Swiss Packaging Machine Case* is illustrative.<sup>133</sup> In that case, involving a seriously defective packaging machine, the Swiss Federal Supreme Court held:

The packaging machine delivered by [Seller] only achieved 29% of the agreed performance. Given a loss of productivity of 71%, [Buyer] is substantially deprived of what it has been entitled to expect under the contract. This amounts to a fundamental breach. The numerous attempts by [Seller] to cure the lack of conformity also demonstrate that the non-conformity could not be remedied within a reasonable time. Moreover, the particular packaging machine was specifically designed for [Buyer]'s individual needs. Therefore, any resale of the machine has been impossible or at least inappropriate for [Buyer].<sup>134</sup>

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when the parties do not sufficiently communicate and cooperate with each other.”). Or when a party acts for an opportunistic reason.

132. In this article, the word “feasible” is used to mean “practicable, meeting all the conditions of reasonableness.”

133. See Bundesgericht [BGer] [Federal Supreme Court], 18 May 2009, 4A\_68/2009, translation available at <http://cisgw3.law.pace.edu/cases/090518s1.html> (last updated May 7, 2010) (Switz.) (Packaging Machine Case).

134. *Id.*

The *Italy Plastic Bag Recycling Machine Case* is also illustrative.<sup>135</sup> From the very beginning, a machine for recycling plastic bags failed to function properly. The fact that the machine never functioned at the optimal levels it reached during testing was central to the case's disposition. An Italian District Court held:

It is indeed indisputably shown that even after the interventions and repairs conducted by [Seller], the machine was far away from achieving the promised production capacity. In fact, it has been proven that the interruptions of the production cycle continued. So did the replacements, repairs, maintenance, increased power consumption and low production level, which resulted in economic inefficiency of the production.<sup>136</sup>

The *U.S. Compressors for Air-Conditioners Case*,<sup>137</sup> which is analyzed in Section A of Part IV, is also illustrative. "[S]everal unsuccessful attempts to cure the defect in the compressors" were made before the buyer declared the contract avoided.<sup>138</sup> In all of the above cases, the courts found a fundamental breach. Probably, it was relatively easy for them to do so, with the failure of genuine endeavors to repair the machines likely convincing the judges that the lingering breaches amounted to fundamental ones.

This understanding of fundamentality also aligns with cases where judges have denied avoidance, inferring that the reasonable efforts of a party would have cured the defects. The *Switzerland Inflatable Triumphal Arch Case* is demonstrative.<sup>139</sup> The buyer obtained from the seller three inflatable triumphal arches, which were set beside a car racing circuit for advertisement. On the first day of the race, one of them collapsed. The race management official took down all the arches. Subsequently, the buyer informed the seller of the defects, and some two weeks later declared the contract avoided. The court denied a fundamental breach, stating that if a remedy had been carried out after the first use, the arches could have been used during later races.

Thus, by applying the principle of good faith, parties, courts, and scholars are relieved from the futile inquiry of how substantial a substantial detriment must be in order to pass the muster of article 25, qualifying as a fundamental breach. Instead, let the parties draw a line in the sand of substantiality for themselves. They are usually the most acquainted with the

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135. See Trib. di Busto Arsizio, 13 Dicembre 2001, n.1192, translation available at <http://cisgw3.law.pace.edu/cases/011213i3.html> (last updated November 26, 2012) (It.) (Machinery Case).

136. *Id.*

137. 71 F.3d 1024, *supra* note 46.

138. *Id.* at 1027.

139. Handelsgericht Aargau [HG] [Commercial Court], Nov. 5, 2002, OR.2001.00029, translation available at <http://cisgw3.law.pace.edu/cases/021105s1.html> (last updated Dec. 9, 2009) (Switz.) (Inflatable Triumphal Arch Case).

peculiar characteristics of their own problems. It is better to make them formulate a remedy of their own, one best suited to their unique situation. But in cases where remedial measures have not been taken when they seem to have been possible, it is for a judge to decide the feasibility of remedy, with the help of the parties and experts.

### VIII. CONCLUSION

Presently, courts and tribunals have difficulty applying article 25. The actual situation is aptly described:

Several factual and abstract circumstances must be considered before the interpreter can say that a fundamental breach did occur. As a result, it may become difficult to respond to the basic question [of] whether a contract is avoidable or not in a particular situation, without submitting the case to a court of law or to an arbitral tribunal.<sup>140</sup>

Fortunately, in our long quest for a sensible interpretation of article 25, we have found a solution: determining the existence of a fundamental breach based on the success of the parties' (now mandatory) good faith efforts to remedy the non-compliance of goods. The verdict they reach after deliberations and trials will work as a sorting mechanism to distinguish fundamental breaches from non-fundamental ones. This test saves us an otiose quest for a definition of "fundamental" using "substantial"—which, as we have discussed, is at best a "playful tautology."<sup>141</sup>

Still, the final answer will be made by a court. This is implied in the letters of article 49(1), providing, "The buyer *may declare* the contract avoided."<sup>142</sup> This tells the buyer, "You may declare if you wish, but a court may hold otherwise if the seller could have remedied the non-compliance." Thus, the CISG leaves the initial judgement of fundamentality of breach to the declaring party, to be checked by both counterparty and court.<sup>143</sup> This article has advocated that the initial (subjective) judgement of fundamentality of breach should be scrutinized by the collaborative, bona fide efforts of both parties to cure the defects. If the defects have been cured, there is no fundamental breach, and if they have not be cured, there remains a fundamental breach and the buyer can avoid the contract.

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140. Grebler, *supra* note 56, at 409.

141. Michael Will, *Article 25, in VIENNA COMMENTARY, supra* note 5, at 211.

142. CISG, *supra* note 1, art. 49(1) (emphasis added).

143. See U.N. Secretariat, Commentary on the Draft Convention on Contracts for the International Sale of Goods, at 41, art. 45 (now art. 49), commentary ¶ 2, U.N. Doc. A/CONF.97/19 (1980) ("Under article [49] of this Convention the contract is still in force unless the buyer has affirmatively declared it avoided. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the contract avoided.").

This author sincerely hopes this article will save parties from going to court, which may compel far more time, cost, and inconvenience than making another transaction for sound goods with another seller from scratch. Hopefully, this article will also save time for judges who might agonize in searching for a universal criterion of substantial detriment in vain. While scholars have time to muse, judges and lawyers usually do not, and merchants even less.<sup>144</sup>

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144. See Michael Will, *Article 25*, in VIENNA COMMENTARY, *supra* note 5, at 208 (“But while philosophers have time to muse, lawyers usually have not; and merchants even less.”).